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Mr Justice Catron.

SUPREME COURT OF THE UNITED STATES.

No. ~~189~~. 123.

TEXAS NISWANGER AND WILLIAM T. NISWANGER, INFANTS, BY THEIR GUARDIAN AD LITEM, NORMAN GAY AND NORMAN GAY AND AL., PL'FFS IN ER.

vs.

MARY D. SAUNDERS, WIDOW, AND P. W. B. SAUNDERS AND AL., INFANTS, BY THEIR NEXT FRIEND, FRANCIS ASBURY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

GOVERNMENT PRINTING OFFICE.

Ohio

719

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1 THE STATE OF OHIO, *ss:*

At a term of the supreme court of the State of Ohio, continued and held in the court-room of the capitol, in the city of Columbus, before the honorable Josiah Scott, chief justice, and Milton Sutliff, William V. Peck, William Y. Gholson, and Jacob Brinkerhoff, justices, on the 26th day of March, in the year of our Lord one thousand eight hundred and sixty-one, there were, among others, the following proceedings, to wit:

MARY D. SAUNDERS *et al.* *vs.* WILLIAM T. NISWANGER *et al.* } In chancery.—Reserved in Madison county.

Be it remembered that at the December term, A. D. 1856, of said supreme court, the said complainants, by P. B. Wilcox, esq., their solicitor, filed in the office of the clerk of said court a duly certified transcript of the journal entries in said cause, including the certificate of reservation from the district of Madison county to the district court of Franklin county, and the certificate of reservation from the district court of Franklin county to this court, which said transcript and certificates of reservation are in the words and figures following, to wit:

Certificate of reservation, Madison Co

MARY D. SAUNDERS & others *vs.* CHRISTOPHER NISWANGER & others. } Madison district court, 1855.—In chancery.

2 On motion, and by consent of parties, this cause is reserved for decision on the circuit, and the plaintiffs have leave to amend their bill.

THE STATE OF OHIO, *Madison county, ss:*

I, A. A. Hume, clerk of the district court for said county, do hereby certify that the above entry is truly copied from the journals of said court.

In testimony whereof, I have hereunto set my name and affixed the [SEAL.] seal of said court, at London, this first day of October, A. D. 1855.

A. A. HUME, *C'k.*

Certificate of reservation in Dist. Ct. Fr. Co.

THE STATE OF OHIO, *Franklin county:*

At a special term of the district court of the State of Ohio in and for said county, held, according to printed notice, at the court-house

in the city of Columbus on the 22d day of December, A. D. 1855, among others were the following proceedings, to wit:

MARY D. SAUNDERS *et al.*
vs.
WILLIAM T. NISWANGER *et al.*
} In chancery.—Reserved from Madison county.

This day came the parties, and the defendants, the widow and heirs of C. Niswanger, have leave to withdraw the demurrer herein filed, and answer forthwith; and thereupon, it appearing to the court that important and difficult questions arise for determination in
3 this case, on motion of the complainants it is ordered that this cause be reserved for final decision in the Supreme Court.

I, A. B. Buttles, clerk of said court, do hereby certify that the foregoing order is truly copied from the journal of said court at the term aforesaid.

Witness my hand and the seal of said court, at Columbus, this 3d day of Jan'y, A. D. 1856.

[SEAL.]

A. B. BUTTLES, *Clerk*,
By H. S. MILLER, *Depty*.

Transcript.

THE STATE OF OHIO, *Madison county, ss:*

I, A. A. Hume, clerk of the court of common pleas within and for the county of Madison, do hereby certify that the following entries and decree are truly taken and copied from the journals of said court, to wit:

Appearance.

September term, 1840.—In chancery.—This day came Christopher Niswanger, by Brush & Gilbert, his counsel, and entered herein the appearance of said Niswanger to the bill herein filed by complainants.
May term, 1841.—Continued by consent.
July term, 1841.—Continued.

Rule to answer.

March term, 1842.—On motion, the respondent is ruled to answer by the first day of next term, and this cause was continued.
4 June term, 1842.—Continued.
September term, 1842.—Continued.
March term, 1843.—Continued.
May term, 1843.—Submitted to court and continued.
September term, 1843.—Continued.
April term, 1844.—Continued.
July term, 1844.—Continued.
November term, 1844.—Continued.
April term, 1845.—Continued.
July term, 1845.—Continued.

Leave to amend.

September term, 1845.—On motion, leave is given the plaintiffs to amend their bill, and cause continued.
March term, 1846.—Continued under former order.
June term, 1846.—Continued under former order of amendment.
September term, 1846.—Continued under former order of amendment.
May term, 1847.—Continued under former order of amendment.
August term, 1847.—Continued under former order of amendment.
November term, 1847.—Continued under former order of amd'nt.
March term, 1848.—Continued under former order.
May term, 1848.—Continued under former order of amendment.
September term, 1848.—Continued.
April term, 1849.—Continued under former order of amendment.
June term, 1849.—Continued under former order of amendment.
September term, 1849.—Continued.
April term, 1850.—Continued.
June term, 1850.—Continued.
September term, 1850.—Continued.
May term, 1851.—Continued
August term, 1851.—Continued.
November term, 1851.—Continued.
April term, 1852.—Death of defendant suggested and cont'd.
August term, 1852.—Death of defendant suggested and continued.
November term, 1852.—Continued.
April term, 1853.—Continued.
June term, 1853.—Continued under general continuance.

Order.

October term, 1853.—On motion to the court by the complainants in the supplemental and bill of revivor filed herein, it is ordered that James S. Jones be, and he is hereby, appointed guardian ad litem for Texas Niswanger and William T. Niswanger, the infant defendants to said supplemental bill and bill of revivor; whereupon the said James S. Jones appeared in open court, accepted said appointment, and filed his answer as such guardian ad litem; and thereupon Eli W. Gwynne, one of the defendants to said bill, by Messrs. Swan & Andrews, his solicitors, moved to dismiss said bill, which motion was argued by counsel; whereupon it is ordered by the court that the said motion be, and the same is hereby, overruled, and this cause is continued.

Guard'n ad litem appointed.

April term 1854.—On motion of defendants, the guardian ad litem, herein before appointed, is removed, and Norman Guy is appointed in his stead guardian ad litem to the infant defendants, William T. Niswanger and Texas Niswanger, infant defendants; and thereupon the said guardian appeared and filed his demurrer to the original bill in behalf of said infants, submitted and continued.

June term, 1854.—Continued under general continuance.
October term, 1854.—Submitted to the court and continued.
April term, 1855.—Submitted and continued.
June term, 1855.—This cause came on to be heard upon the original bill, supplemental bill, and bill of revivor, the answer of the said Eli W. Gwynne, exhibits, &c., and also upon the demurrer filed herein by the other defendants, and was argued by counsel; and thereupon the court, being fully advised in the premises, do find the equity of the case is with the defendants, and that said complainants are not entitled to relief in a court of equity, and said demurrer is sustained; and thereupon it is ordered, adjudged, and decreed that said bills be, and the same are hereby, dismissed; and it is further ordered that said complainants pay the costs herein taxed to $ within thirty days, and in default thereof that execution issue therefor as upon judgments at law; and thereupon said complainants gave notice of appeal to the district court of Madison county, and it is ordered by the court that the amount of the appeal bond be fixed at one hundred dollars.

7 In testimony whereof, I have hereunto set my hand and [L S.] seal of office this 23d day of August, A. D, 1855.

A. A. HUME, *C'k.*

Bill.

And along with said certificate of reservation and transcripts were also filed in the clerk's office of said Supreme Court the original papers in said case, which are as follows, to wit:

To the honorable the judges of the court of common pleas of Madison county, in the State of Ohio, in chancery sitting:

Humbly complaining, sheweth unto your honors, your orators, Mary D. Saunders, widow, and Paulina W. B. Saunders, infant, Gamaliel Iscarriot Saunders, infant, Martina Saunders, infant, of the county of Logan, in the State aforesaid, by Francis Asbury, of Madison county and State aforesaid, their next friend, that heretofore, to wit, on or about the 12th day of April, A. D. 1837, a certain Samuel Hyde Saunders, then in full life, caused an entry in his own name as assignee to be made in the book of entries in the office of the principal surveyor of the lands set apart to satisfy the claims of the officers and soldiers of the Virginia line on continental establishment during the war of the revolution, which entry is numbered thirteen thousand eight hundred and eighty-four, (No. 13884,) contains 428⅔ acres of land, is based on part of two military warrants, viz: 381⅔ acres on No. 6658, and 46⅔ acres on No. 6649, situate on the waters of Deer creek, in the county of Madison, in the State aforesaid, and within the jurisdiction of this court. Your orators file, as a part hereof, a copy of said entry, (marked A,) and aver that said entry was made in strict conformity to law, with so much certainty and precision as to enable others to enter the adjacent residue, and that it appropriated the lands

8 embraced within its calls. Your orators further charge that a survey of said entry was afterwards made in strict conformity

to its calls, returned and recorded, (a copy whereof is herewith filed as part hereof, marked B,) and on the 20th of November, A. D. 1838, the said Samuel Hyde Saunders obtained a patent thereon in his own name, which is herewith filed as a part hereof, marked C. Your orators further charge that on or about the 11th day of January, A. D. 1840, the said Samuel Hyde Saunders departed this life intestate, leaving your orators, the said Mary D. Saunders, his widow and relict, and Paulina W. B. Saunders, Gamaliel Iscarriot Saunders, Martina Saunders, and Sempronius Saunders, his only children, heirs and legal representatives, him surviving, in whom his interest and estate in the lands and premises above mentioned became vested on his decease as his said widow and heirs. Your orators further charge that on the said 20th day of November, A. D. 1838, a certain Christopher Niswanger, of Franklin county, in the State aforesaid, (whom your orators make a defendant to this their bill of complaint,) obtained from the United States a patent for 640 acres of land, which purports to have been made on an entry and survey No. 6780, and to be based on three military warrants, No. 1897, 332, 1234, and 40 acres on part of warrant No. 750, which patent or grant includes within its specified boundaries the identical lands patented to your orators, said ancestor, as aforesaid. Your
9 orators file, as part hereof, a copy of said patent, marked D. And your orators aver that the patent thus obtained from the United States by the said defendant as aforesaid, covering the lands in question, was obtained by the said defendant from the United States through fraud and imposition on his part, and in fraud of the prior vested equitable right and title which your orators' said ancestor had acquired to said land as aforesaid, and that the patent thus granted to the said defendant rests upon no legal or equitable foundation. That it was obtained under the following circumstances, viz: On the 21st July, 1784, an entry No. 70, of 1,000 acres, on several military warrants, was made in the book of entries in the office of said principal surveyor, in the name of David Ross & Co., upon the Ohio river, adjoining and above Sigismond Stribling's entry for 1,666⅔ acres on the southeasterly side of the river Ohio, in the Green River country, in the new State of Kentucky. A copy of said entry, marked E, your orators file as part hereof. That entry was afterwards surveyed, returned, and recorded, (a copy whereof is filed as part hereof, marked F,) and afterwards, on or about the 15th June, A. D. 1776, a patent was granted by the Commonwealth of Virginia to the said David Ross, in trust for said lands. That the above entry and survey, in
10 the name of the said David Ross & Co., patented as aforesaid, were founded in part on the following warrants and part of a warrant to wit: 200 acres on warrant No. 1819, in the name of Thomas Waters, and assigned to David Ross & Co.; 200 acres on No. 332, in the name of Henry Punter, and assigned to same; 200 acres on No. 1234, in the name of Henry Lipscomb, and assigned to same; and 40 acres on part of No. 750, in the name of William Craston, and assigned to same. In virtue of which said entry, survey, and patent, so made and granted, as last aforesaid, your orators charge said warrants, and part became, and were and are functus officio, and no longer an authority

to appropriate other and different land. That some time subsequent to the month of March, A. D. 1807, the said David Ross & Co., under a pretence that 640 acres of their said entry and survey No. 70, of 1,000 acres, patented as aforesaid, had been lost by interference with Henderson's grant, (the said patent being still outstanding and not surrendered up to either the Commonwealth of Virginia or the Commonwealth of Kentucky, and cancelled,) and without any legal authority derived either from the said Commonwealth of Virginia or Kentucky, or from the United States, or from any other legal authority, withdrew, or *ruther* attempted to withdraw the three warrants
11 and part of the warrant last above referred to by causing to be written on the margin of the said book of entries, opposite their said entry No. 70, of 1,000 acres, these words following, viz: 640 withdrawn and entered in 197; and afterwards, to wit, on the 21st day of May, 1810, caused a new entry, No. 6780, to be made in the book of entries in the office of the said principal surveyor on said three warrants and part of a warrant so *attempted* to be withdrawn as aforesaid; which said entry for 640 acres *and* is made in the name of David Ross, ass'r, in trust for David Ross & Co., calls to be on the waters of Deer creek, and covers the land in question. Your orators also file, as parts hereof, copies of the said entry and survey made thereon, marked G and H. Your orators aver said entry and survey to be null and void, as the same are based on warrants previously satisfied and functus officio; that if said warrants were not functus officio at the time said last entry and survey were made, said entry was afterwards rendered vague, uncertain, fraudulent, and void by the withdrawal from said entry and survey warrants No. 332 and 1234 each of 200 acres, and forty acres, part of warrant No. 750, leaving only one warrant, to wit, warrant No. 1819 of 200 acres, to cover the entire bounds of the lands embraced in said entry and survey, and causing said warrants and part so withdrawn from said last-mentioned entry to be included in an entry of 1,600 acres, No. 10192,
12 made in the name of the said David Ross on the 24th day of May, 1820, on the waters of the Scioto river; and your orators file, as part hereof, a copy of said last-named entry and amendment, marked I. On this last-named entry a survey was afterwards returned and recorded, and a copy thereof is herewith filed as part hereof, marked J; and the entry and survey last named were, by certain persons claiming as the heirs and assigns of the said David Ross, afterwards sold to one Lyne Starling; that the whole of said survey of 1,000 acres in Kentucky was sold and conveyed to one Robert Triplet, and a full consideration therefore paid to said Ross, or his executor, without any suggestion or pretence whatsoever of any interference with any other entry or survey; that said Starling, and those claiming under him, still continue owners of said 1,600 acres, located in Marion county, and your orators insist that the thus using the same warrants at different times, and in different places, for the purpose of obtaining treble satisfaction, was and is a fraud upon other bona fide holders of unsatisfied warrants; and they further insist that the making said entry in Marion county, and carrying the same into grant, and selling and conveying the

same to a purchaser without notice of the prior location, which was the fact in this case, and the peaceable and undisturbed possession thereof by purchasers to this time was and is a virtual withdrawal, vacating, and abandoning of the whole, or, if not the whole, at least so much of said survey in Madison county as was
13 covered by said warrants, 333 and 1234, of 200 acres each, and 40 acres of warrant 750—in all, 440 acres—afterwards relocated in Marion county; so that said 440 acres in Madison county were left open and free for your orators' said father to make his said entry of 428½ acres upon; thus leaving 20⅝ acres of said entry in Madison county still covered by said Ross' warrant, No. 1899, of 200, unless the same be held to be vacated by the relocation of the same warrant, 1899, as part of the 1,600 acres in Marion county. And your orators further represent that afterwards, on or about the 10th day of July, 1834, a certain Crawford H. Hall and Edward Myers, for and in consideration of one dollar, purporting to have been paid by them to Fred. A. Ross, as executor of David Ross, deceased, and also as legatee of said David Ross, deceased, and for himself as owning on fourth part of the residuary interest in the estate of said David Ross, deceased, by purchase from Benj. Lewis, who was assigee of David Ross, jun., dec'd, who was a legatee of said David Ross, sen., deceased, and for Jacob Myers and Eliza T., his wife, and John Duffield and Amanda, his wife, by power of attorney, obtained from the said Fred. A. Ross, executor as aforesaid, a deed of conveyance, a copy whereof, marked K, is here filed as part of this your orators' said bill of complaint in this behalf. And the said defendant, Christopher Niswanger, with perfect notice and knowledge of the premises, made the false
14 pretence that the said deed, marked K, passed to the grantees therein named the entire interest in the lands in question; afterwards obtained from said grantees an assignment, and thereupon afterwards by fraud actually procured from the United States said patent, a copy of which is marked D, as herein above stated. In virtue of which said fraudulent and void patent the defendant now pretends to have the ownership legal and equitable of said lands, and refuses to surrender the possession thereof to your orators, and either to withdraw or release his claim thereto, as in equity and good conscience he ought to do. And as your orators are advised by counsel, and so charge, that as the aforesaid patents to your orators' said ancestor and the said defendant for the lands in question were each granted on the same day, your orators cannot adjust their claim to said land in a court of law, and that their only and appropriate remedy, as against the defendant, in order to recover the possession and to be quieted in their title to said lands, is on the equity side of this honorable court, where matters of this nature are only and properly cognizable and relievable. Your orators, therefore, pray that the writ of subpœna against the said defendant may issue, that the defendant may, on oath, fully answer the allegations in this bill, and that
15 on the final hearing of this cause your honors would by your decree compel the said defendant either to withdraw so much of his said fraudulent and void claim as interferes with the above claim of your orators, or release to your orators so much of his said

claim as interferes with the claim of your orators—yield up the possession thereof, and account for the rents and profits, which your orators charge to have been considerable and of great value, and grant them such further and other relief in the premises as to equity may appertain; and, as in duty, they will ever pray.

THOMAS SCOTT & SON.
H. W. SMITH,
Solicitors for Complainants.

Exhibit A.

1837, April 12.—No. 13884.

Samuel Hyde Saunders, ass'e, enters 428⅓ acres of land on part of two military warrants, viz: 381⅔ acres on No. 6658, and 46⅔ acres on No. 6649, on the waters of Deer creek: beginning at the northwest corner of Cadwallader Wallace's survey, No. 9473; thence N. 46 E. 220 poles; thence north 12 poles; thence N. 45° W. 538 poles; thence S. 48 W. 106 poles; thence S. 42 E. 136 poles; thence S. 48 W. 30 poles; thence S. 10 E. 75 poles; thence S. 42 E. 150 poles; thence N. 48 E. 30 poles; thence S. 30 E. 223 poles, to the beginning.

16 *Exhibit B.*

(See original.)

Surveyed for Samuel H. Saunders, ass'e, 428⅓ acres of land on part of two military warrants, viz: 381⅔ acres on No. 6658, and 46⅔ acres on No. 6649, on the waters of Deer creek: beginning at two large white oaks and a small hickory, northwest corner to Cadwallader Wallace's survey, No. 9473; thence N. 46 E. 220 poles to three elms, northeast corner to said survey; thence north 12 poles to two hickories and a white oak; thence N. 45 W. 538 poles to two white oaks, southwest corner to Richard Preddy's survey, No. 4481; thence S. 48 W. 106 poles to two white oaks, northeasterly corner to Richard Apperson's survey, No. 6288; thence S. 42 E 136 poles to a bur-oak and hickory, corner to said survey; thence S. 48 W. 20 poles to a hickory and white oak, corner to said survey; thence S. 10 E. 75 poles to two hickories and a bur-oak, corner to said survey; thence S. 42 E 150 poles to a stake in the line of said survey, and in the of Joseph Harress' survey, No. 5531, of 280 acres; thence N. 48 E. 30 poles to a stake, east corner to said survey; thence S. 30 E. 223 poles, to the beginning.

E. P. KENDRICK, *D. S.*

APRIL 12th, 1837.

SAM'L H. SAUNDERS, *M. K. V.*

PHILLIP ASBURY, } *C. C.*
FRANCIS ASBURY, }

17 Ex'd and rec'd April 13th, 1837.

SURVEYOR'S OFFICE FOR THE VIRGINIA MILITARY DISTRICT IN THE STATE OF OHIO.

I, W. Marshall Anderson, surveyor of said military district, do certify that the foregoing entries, viz: No. 10192, and amended entry of the same number, and survey No. 10192 for 1,600, also entry and survey No. 13884 for 428⅓ acres, are true copies from the records of my office.

Given under my hand and seal of office, at the city of Chillicothe, [L. S.] this 25th day of Sept, A. D. 1839, and 64th year of the independence of the United States

W. MARSHALL ANDERSON.

Exhibit C.

No. 13884.—428⅓ acres.

Martin Van Buren, President of the United States of America, to all to whom these presents shall come, greeting:

Know ye that, in consideration of military service performed by Wood Jones, a lieutenant for the war, and by William Christian, a lieutenant for three years to the United States, in the Virginia line on continental establishment, and in pursuance of an act of the Congress of the United States, passed on the 10th day of August in the year 1790, entitled "An act to enable the officers and soldiers of the Virginia line on continental establishment to obtain titles to cer-
18 tain lands lying northwest of the river Ohio, between the Little Miami and Scioto," and other acts of the said Congress amendatory of the said act, there is granted by the United States unto Samuel H. Saunders, assignee of the heirs and legal representatives of the said Wood Jones, dec'd, also assignee of Josiah Baldwin, who was assignee of the said William Christian, by Samuel H. Saunders, his attorney in fact, and a certain tract of land containing four hundred twenty-eight and one-third acres, situate between the Little Miami and Scioto rivers, northwest of the river Ohio, as by survey bearing date the twelfth day of April, 1837, and bounded and described as follows, viz:

Survey No. 13884, of four hundred twenty-eight and one-third acres of land on part of two military warrants, viz: 381⅔ acres on part of warrant No. 6658, (the whole thereof being for 2,666⅔ acres,) issued in favor of the heirs and legal representatives of Wood Jones, dec'd, and 46⅔ acres on part of warrant No. 6649, (the whole *whole* thereof being for 666⅔ acres,) issued in favor of the said William Christian, on the waters of Deer creek, beginning at two large white oaks and a small hickory, northwest corner to Cadwallader Wallace's survey, No.——; thence north forty-six degrees east two hundred and twenty poles to three elms, northwest corner to said survey; thence north twelve poles to two hickories and a white oak; thence north forty-five degrees west five hundred and thirty-

eight poles to two white oaks, southeast corner to Richard Preddy's survey No. 4481; thence south forty-eight degrees west one hundred and six poles to two white oaks, northeasterly corner to Richard Apperson's survey No 6288; thence south forty-two degrees east one hundred and thirty-six poles to a bur-oak and hickory, corner to said survey; thence south forty-eight degrees west twenty poles to a hickory and white oak, corner to said survey; thence south ten degrees east seventy-five poles to two hickories and a bur-oak, corner to said survey; thence south forty-two degrees east one hundred and fifty poles to a stake in the line of said survey, and in the line of Joseph Harness' survey No. 5531, of 280 acres; thence north forty-eight degrees east thirty poles to a stake, east corner to said survey; thence south thirty degrees east two hundred and twenty-three poles, to the beginning, with the appurtenances. To have and to hold the said tract of land, with the appurtenances, unto the said Samuel H. Saunders, and to his heirs and assigns forever.

In witness whereof, the said Martin Van Buren, President of the United States of America, hath caused the seal of the General [L. S.] Land Office to be hereunto affixed, and signed the same with his hand, at the city of Washington, the twentieth day of November, in the year of our Lord 1838, and of the independence of the United States of America the sixty-third.

20 MARTIN VAN BUREN,
By M. VAN BUREN, jr., *Secretary*.

By the President:
H. M. GARLAND,
Recorder of the General Land Office.

Exhibit D.

No. 6780.—640 acres.

Martin Van Buren, President of the United States of America, to all to whom these presents shall come, greeting:

Know ye that, in consideration of military services performed by Thomas Waters, a soldier for the war, Henry Punter, a sergeant for three years, Henry Lipscomb, a fifer for the war, and William Cratton, a soldier for the war to the United States in the Virginia line on continental establishment, and in pursuance of an act of the Congress of the the United States, passed on the 10th day of August in the year 1790, entitled "An act to enable the officers and soldiers of the Virginia line on continental establishment to obtain titles to certain lands lying northwest of the river Ohio, between the Little Miami and Scioto, and other acts of the said Congress amendatory of the said act, there is granted by the United States unto Christopher Niswanger, assignee of Crawford W. Hall and Edward A. Myers, assignees of Frederick A. Ross, executor of the last will and testament of David Ross, deceased, who was also one of the residuary devisees, as well as attorney in fact of the remaining residuary devisees of the said David Ross, dec'd,

21 who was assignee of the said Thomas Waters, the said Henry Punter, the said Henry Lipscomb, and the said William Crat-

ton, (the same warrants having been formerly located in the district of Kentucky and patented by the Commonwealth of Virginia to the said David Ross, in trust for David Ross & Co., which has since been lost by interference with a prior claim, to wit, Henderson's grant, and the said warrants withdrawn and relocated in the Virginia military district of Ohio, upon which the said survey is founded,) a certain tract of land, containing six hundred and forty acres, situate between the Little Miami and Scioto rivers, northwest of the river Ohio, as by survey bearing date the twenty-ninth day of September, 1817, and bounded and described as follows, to wit: Survey No. 6780, of six hundred and forty acres of land on several military warrants, viz: On warrant No. 1899 for two hundred acres, in favor of said Thomas Waters; on warrant No. 322 for 200 acres, in favor of said Henry Punter; on warrant No. 1234 for 200 acres, in favor of the said Henry Lipscomb; and forty acres on part of warrant No. 750, (the whole thereof being for 200 acres,) in favor of said William Cratton, on the waters of Deer creek, beginning at two bur-oaks, southeasterly corner to Richard Preddy's survey No. 4481; thence south forty-five degrees east five hundred and forty poles to two hickories and a white oak, in the line of George Hoffman's survey No. 6246; thence south 22 twelve poles to three elms; thence south fifty degrees west three hundred and forty-nine poles to a stake in a prairie; thence north forty degrees west one hundred and seventy-seven poles to two white oaks and three bur-oaks, southwesterly corner to Richard Apperson's survey No. 6288; thence north forty-eight degrees east one hundred and sixty-six poles to three bur-oaks, southeasterly corner to said survey; thence north forty-two degrees west one hundred and eighty poles to a bur-oak and two hickories, corner to said survey; thence north ten degrees west seventy-five poles to a white oak and hickory, corner to said survey; thence north forty-eight degrees east twenty poles to a bur-oak and hickory, corner to said survey; thence north forty-two degrees west one hundred and fifteen poles to two white oaks, corner to said survey, in the line of Preddy's said survey; thence north forty-eight degrees east ninety-seven poles to the beginning, with the appurtenances. To have and to hold the said tract of land, with the appurtenances, unto the said Christopher Niswanger, and to his heirs and assigns forever.

In witness whereof, the said Martin Van Buren, President of the United States of America, hath caused the seal of the General [L S.] Land Office to be affixed, and signed the same with his hand, at the city of Washington, the twentieth day of November, in the year of our Lord 1838, and of the independence of the United States of America the sixty-third.

MARTIN VAN BUREN,
By M. VAN BUREN, *Sec'y.*

By the President:
H. M. GARLAND,
Recorder of the General Land Office.

23 GENERAL LAND OFFICE.

I, James Whitcomb, Commissioner of the General Land Office, do hereby certify that the foregoing is a true copy of the patent taken from the records of this office.—(Vol. 14, 396–'7)

In testimony whereof, I have hereunto subscribed my name and caused the seal of the office to be affixed, at the city of Washington, this 16th of August, 1839.

[L. S.]

JAS. WHITCOMB.

Exhibit E.

1784, July 21st.—No. 70—9.—640 acres withdrawn and entered in 197.

David Ross & Co., ass'ees, enters one thousand acres on several military warrants on the Ohio river, adjoining and above Sigismond Stribling's entry for 1,666⅔ acres, running from his upper corner six hundred poles when reduced to a straight line, thence at right angles for quantity.

24 *Exhibit F.*

(For diagram see original.)

Surveyed for David Ross & Co. 1,000 acres of land on several military warrants on the Ohio, beginning opposite Elk island, at Sigismond Stribling's upper corner, two large cotton trees, running up the river S. 54 E. 600 poles to a large sycamore and two maples; thence S. 45 W. 296 poles to a black walnut and box elder; thence N. 58 W. 528 poles to two hickories; thence E. 107 poles to a large maple; thence to the beginning.

ELI SUNGHUM, *D. S.*

LOUISVILLE, *Nov.* 17, '84.

Ex'd and rec'r'd Nov. 29, 1785.

W. MARSHALL ANDERSON, *S.*

25 *Exhibit G.*

1810, May 21st.—No. 6780.—327 C.

David Ross, ass'ee in trust for David Ross & Co., enters 640 acres of land on three military warrants, No. 1899, 332, 1234, and 40 acres on part of No. 750, on the waters of Deer creek: beginning at two white oaks southeast corner to Richard Priddy's survey No. 4481; thence S. 45 E. 550 poles; thence S. 50° W. 395 poles; thence N. 35 W. 155 poles to the southwest corner of Richard Apperson's 700 acres entry; thence N. 48 E. with a line thereof to the southeast corner of said entry; thence with the several lines thereof, northwestwardly and binding thereon to said Priddy's survey; thence with his line to the beginning.

Exhibit H.

Surveyed for David Ross, ass'ee in trust for David Ross & Co., 640 acres of land on three military warrants, No. 1899, 332, 1234, and

40 acres on part of No. 750, on the waters of Deer creek: beginning at two bur-oaks, southeasterly corner to Richard Priddy's survey No. 4485; thence south 45 E. 540 poles to two hickories and a white oak, in the line of George Hoffman's survey No. 6246; thence south 12 poles to three elms; thence S. 50 W. 349 poles to a stake in a prairie; thence N. 40 W. 177 poles to two white oaks and three bur-oaks, southwesterly corner to Richard Apperson's sur. No. 6288; thence N. 48 E. 166 poles to three bur-oaks, southeasterly corner to said survey; thence N. 42 W. 180 poles to a bur-oak and two
26 hickories, corner to said survey; thence N. 10 W. 75 poles to a white oak and hickory, corner to said survey; thence N. 48 E. 20 poles to a bur-oak and hickory, corner to said survey; thence N. 42 W. 115 poles to two white oaks, corner to said survey, in the line of Priddy's survey; thence N. 48 E. 97 poles, to the beginning.

CADWALLADER WALLACE, *D. S.*

APRIL 26th, 1816.

JESSE BARRETT,
DAYTON RUSSELL, } *C. C.*
JOHN HOFFMAN, *M'kr.*

Exam'd and rec'r'd Sept. 29, 1817.

W. MARSHALL ANDERSON, *S.*

SURVEYOR'S OFFICE FOR THE VIRGINIA MILITARY DISTRICT IN THE STATE OF OHIO.

I, W. Marshall Anderson, surveyor of said military district, do certify that the foregoing entries and surveys are truly copied from the records of my office; and I do further certify that there never has been admitted to record in this office any other survey of the said entry No. 70, or any resurvey of the said survey No. 70, or any part thereof. Given under my hand and seal of office, in the
[L. S.] city of Chillicothe, this 25th day of Sept., A. D. 1839, and 64th year of the independence of the United States.

W. MARSHALL ANDERSON.

Exhibit I.

1820, May 24th.—No. 10192.—Amended, 510.

Daniel Ross enters 1,600 acres of land on the following military warrants: 200 acres on No. 3034, 332, 750, 1234, 1427, 1585, 1592, and 1404, on the waters of Scioto river, beginning at three beeches, a sugar tree and lynn, 372 poles S. 78 W. from the southwest corner of Rowland Madison's entry No. 10059; thence S. 12 E. 260 poles; thence S. 78 W. 400 poles; thence N. 12 W.; and from
27 the beginning N. 12 W. so far that a line S. 78 W. will include the quantity.

1820, Aug't 12th.—No. 10192.

David Ross amends his entry as follows: beginning 400 poles S. 78 W. from the southwest corner of Rowland Madison's entry No. 10059; thence S. 12 E. 250 poles; thence S. 78 W. 400 poles; thence N. 12 W., and from the beginning N. 12 W. so far that a line S. 78 W. will include the quantity.

Exhibit J.

Surveyed for David Ross, ass'ee, 1,600 acres of land on the following military warrants, No. 3034, 332, 750, 1234, 1427, for 200 acres each; 1585, 1592, for 100 acres each; and 1404 for 400 acres, on the waters of Scioto; beginning at four beeches, northwest corner to George A. Washington's survey No. 258, and southeast corner to Oren Barnes' survey No. 10343; thence N. 12 W. 640 poles, crossing a large branch at 157, and small branches at 240, and 377 poles to three bur-oaks; thence S. 78 W. 400 poles, crossing the south
28 fork of McDonald's creek at 161, at 204, and at 260 poles to three beeches; thence S. 12 E. 640 poles, crossing a branch at 123 and the fork at 203 to two sugar trees and an elm; thence N. 78 E. 400 poles, crossing a branch three times, to the beginning.

THOMAS J. McARTHUR, *D. S.*

Nov. 13, 1821.

FRANCIS THOMPSON, DAVID McARTHUR, } *C. C.*
MATTHEW BONNER, *M'kr.*

Ex'd and rec'r'd Feb. 15, 1822.

W. MARSHALL ANDERSON, *S.*

Exhibit K.

This indenture, made and entered into this 10th day of July, 1834, between Fred. A. Ross, ex'or of David Ross, dec'd, and also as legatee of said David Ross, dec'd, and for himself as owning one-fourth part of the residuary interest in the estate of s'd David Ross, and by purchase from Benj. Lewis, who was assignee of David Ross, jun., dec'd, who was a legatee of s'd David Ross, sen., dec'd, and for Jacob Myers and Eliza T., his wife, and John Duffield and Amanda A., his wife, by powers of attorney, of the one part, and Crawford W. Hall and Edward A. Myers, of the other part, witnesseth: That the said Fred. A. Ross, ex'or, and as aforesaid, for and and in consideration of one dollar to him in hand paid by the said C. W. Hall and Ed. A. Myers, rec't wherof is hereby acknowledged, hath bargained and sold, and by these presents doth bargain and sell, alien, release and confirm, unto the said C. W. Hall and Ed. A. Myers the claim of David Ross, dec'd, to the tracts of land and town lots herein mentioned; it being the distinct understanding that the s'd Fred. A. Ross intends
29 to convey without future liabilities of any sort on him as executor or legatee, or on the estate of s'd David Ross, sen., dec'd, or on s'd Jacob Myers and Eliza F., his wife, and Jno. Duf-

field and Amanda A., his wife, the claim which the s'd David Ross, dec'd, may have to the subjects to be mentioned, whether said claim be real or imaginary, recoverable or irrecoverable, existing in part or in whole; and the said C. W. Hall and E. A. Myers take this deed with the full knowledge and consent to all the uncertainties appertaining to the subject, and without recourse on the party or parties of the first part with the clear understanding, the said Fred. A. Ross doth bargain and sell to the said C. W. Hall and Ed. A. Myers all the lands belonging to or now claimed by David Ross, dec'd, in the State of Ohio, North Carolina, South Carolina and Georgia, also all the lands belonging to or claimed as part of the estate of David Ross, dec'd, in the counties of Patrick Henry and Wood, in the State of Virginia; also, one tract of one hundred and thirty-seven and a half acres, more or less, in the county of Fluvanna, now claimed by Miss Pustem; also, two hundred acres, more or less, in the county Botetourt, adjoining the Fort Lewis estate, supposed not to have been sold with that estate by s'd David Ross, dec'd; also, one tract of four hundred acres, more or less, supposed to be near Scottsville, in the county of Albemarle; also, the interest claimed by s'd David Ross, dec'd, to a tract of land in Grochland county, lying and being not far from the
30 Bird creek, and called the Indian camp; also, one tract in Wythe county, claimed by a certain Crockett; also, one tract claimed in Botetourt, and which was lost in suit with Harney, supposed to contain four hundred acres and adjoining a tract or being part of a tract sold by Gen'l Breckenridge, as agent of Thomas T. Bouldin, to one Wm. Ross, of said county; also, one lot of qr. acre, more or less, in the city of Richmond, near the basin, and near Chevallies' mill; also, lots No. 11, 29, 30, in the town of Charlottesville. To have and to hold all and singular thereto appertaining the lands herein conveyed and lots aforesaid, with the distinct understanding aforesaid unto them the said C. W. Hall and Ed. A. Myers, free from the claim of all persons claiming from David Ross by any title subsequent to this time, and this warranty extends no *futher* and is made so far only in reference to such lands or lots as may be found to exist and belonging to the estate of said David Ross, dec'd; and the parties to this indenture, for the better understanding this instrument, do hereby refer to a certain agreement entered into the 22d May, (1833,) eighteen hundred and thirty-three, between Fred. A. Ross and Jacob Myers, of the one part, and Fred. M. Myers and Ed. A. Myers, of the other part; also to a certain other agreement entered into this day between Fred. A Ross, ex'r, as aforesaid, and C. W. Hall and Ed. A. Myers.

In witness our hands and seals the day and year first written.

FRED. A. ROSS, *ex. of D. Ross, dec., and legatee.* [L. S.]
JACOB MYERS and wife, *by Fred. A. Ross, their att'y.* [L. S.]
31 JOHN DUFFIELD and wife, *by Fred. A. Ross, their att'y.* [L. S.]
C. W. HALL. [L. S.]
EDW'D MYERS. [L. S.]

Certificate endorsed.

FLUVANNA COUNTY, *July 11th*, 1834.

We, Lewisbury Weaver and Joseph H. Turner, justices of the peace in the county aforesaid, in the State of Virginia, do hereby certify that Fred. A. Ross, ex'or of David Ross, dec'd, and for the devisees of David Ross, dec'd, party to the foregoing deed for the conveying of lands, bearing date the 11th July, 1834, thereto annexed, personally appeared before us, in our county aforesaid, and acknowledged the same to be his act and deed, and desire us to certify the said acknowledgment to the clerk of the county court of Fluvanna, in order that the said deed of conveyance may be recorded.

Given under our hands and seals this 11th July, 1834.

LEWISBURY WEAVER.
JOS. H. TURNER.

FLUVANNA COUNTY COURT, *Clerk's Office, July 12th*, 1834.

This deed being this day returned, was thereupon, together with the certificate thereon endorsed of the acknowledgment thereof by Fred. A. Ross, executor of David Ross, and for the devisees of David Ross, deceased, a party thereto, before two justices of the peace for the said county, admitted to record. A true copy from the records of said court.

In testimony whereof, I have hereunto set my hand and caused the seal of the said county court to be hereunto affixed, [L. S.] this 1st day of October, 1834, in the 29th year of the Commonwealth.

ABRA. SHEPHERD, JR., *C. C.*,
By WM. E. SHEPHERD, *D. C.*

32 This deed was filed on the 21st and recorded on the 22d day of November, A. D. 1834.

G. H. BUSBY,
Recorder M. C.

STATE OF OHIO, *Marion county, ss:*

I, George H. Busby, recorder of said county, do hereby certify that the foregoing will and deed are truly copied from the record in my office.

In testimony whereof, I have hereunto set my hand and seal, [L. S.] at Marion, this 1st day of January, A. D. 1835.

G. H. BUSBY, *Recorder.*

GENERAL LAND OFFICE.

I, James Whitcomb, Commissioner of the General Land Office, do hereby certify that the foregoing is a true transcript of a copy of a deed on file in this office.

In testimony whereof, I have hereunto subscribed my name [L. S.] and caused the seal of the office to be affixed, at the city of Washington, the 16th of August, 1839.

JAS. WHITCOMB.

Summons.

THE STATE OF OHIO,
Madison County, ss:

To the sheriff of Franklin county, greeting:

We command you to summon Christopher Niswanger, defendant, if he may be found in your bailiwick, to appear before the judges of the court of common pleas of said county, at the court-house in London, on the 30th day of this instant, A. D. 1840, to answer a petition in chancery exhibited against him by Mary D. Sanders, Pauline W. B. Sanders, Gamaliel Iscarriot Sanders, Martina Sanders, and Sempronius Sanders, plaintiffs; and this you shall in nowise omit under the penalty of one thousand dollars, as it is said; and have then
33 and there this writ.

Witness J. F. Freeman, clerk of said court, at London, this
[L. S.] 24th day of September, A. D. 1840
Attest: J. F. FREEMAN, *Clerk.*

Sept. 25th, 1840: Served on the said Niswanger by copy personally. Fees, 60 cts.

WM. DONNIGAN,
Dept. for J. GRAHAM, *Sh'ff.*

Bill of revivor.

The supplemental bill and bill of revivor of Mary D. Saunders and others:

Said petitioners represent to this honorable court that some time in the year your petitioners filed their bill in chancery in this honorable court against Christopher Niswanger, of the county of Franklin, and State of Ohio, setting forth as therein set forth, and praying a decree quieting the title of your petitioners to entry No. 13,884, of 428⅔ acres in the Virginia military district, so called, in said county of Madison, and for other relief; that process was duly served on said Niswanger, and he appeared and put in a demurrer to said bill; that afterwards, and before any further proceedings were had, the said Niswanger departed this life intestate, leaving Texas Niswanger and William T. Niswanger, infants, his heirs-at-law, and Lydia C. Niswanger (since intermarried with Norman Gay) his widow, all of said Franklin county; and William T. Martin, of the same county, is the administrator of said Christopher Niswanger, duly appointed; that Eli W. Gwynne, also of said Franklin county, by purchase or otherwise from said Niswanger, or his representatives, or some of
34 them, claims a part or the whole of said lands, and is now in possession thereof, under said Niswanger, or under said Niswanger's pretended title, tho' said Gwynne, before and at the time he thus pretended to acquire an interest in said lands, had full notice of your petitioners' rights, as the same are set forth in said original bill, and took the same subject to all the rights, legal and equitable, of your petitioners.

Your petitioners therefore pray that said Norman Gay, and Lydia

C., his wife, Texas Niswanger, William T. Niswanger, and William T. Martin, administrator of said Christopher Niswanger, and said Eli W. Gwynne, may be made parties defendants to said original bill and this supplemental bill and bill of revivor; and that said infants, by their guardian *ad litem* to be appointed by this honorable court, and said other defendants, in their own proper person, may, on their corporal oaths, full and true answer make to all and singular the matters and things in said bills respectively set forth; that said original bill and the proceedings thereon may be revived, and stand in all respects as if the same had not abated; and that your petitioners may have the relief prayed for in their said original bill, and such other and further relief as they are justly entitled to, &c.

By HARRISON, SMITH & WILCOX,
Their Att'ys.

Subp'a.

THE STATE OF OHIO,
Madison county, ss:

To the sheriff of Franklin county, greeting:

We command you to summon William T. Niswanger, Texas
35 Niswanger, Norman Gay, and Lydia C., his wife, Eli W. Gwynne, and William T. Martin, adm'r of Christopher Niswanger, to appear before the honorable the judges of the court of common pleas of said county, at the court-house in the town of London, on the first day of their next term, to answer a petition in chancery exhibited against them by Mary D. Saunders and others. And this shall in nowise omit under the penalty of one thousand dollars; and have you then and there this writ.

[L. S.] Witness, A. A. Hume, clerk of our court of common pleas, aforesaid, this 25th day of August, A. D. 1853.

A. A. HUME, *Clerk.*

Service.

Served this writ on Wm. T. Neiswanger, Texas Neiswagner, Norman Gay, and Lydia C., his wife, Eli W. Gwynne, and Wm. T. Martin, adm'r, by leaving copies at their usual places of residence. Fees, $2 80.

JOHN GREENLEAF, *Sh'ff.*

Aug. 27, 1853.

Answer of E. W. Gwynne.

The answer of Eli W. Gwynne to the bill of revivor, &c., of Mary D. Saunders and others, filed against him and others in court of common pleas of Madison county, Ohio, on the chancery side thereof.

For answer to said original bill, and supplemental bill, and bill of revivor, the said Gwynne, excepting, &c., says: He admits that on
or about 22 June, 1810, David Ross, as assignee in trust for
36 himself and others, entered survey No. 6780 of 640 acres in the Virginia military district; that it was surveyed on April

26, 1816, and lies in Madison county, and is properly described in said bill and the exhibits thereto. As this respondent is informed and believes, and therefore avers, said lands were prior to 1820 listed and entered for taxation in said county of Madison, and the taxes assessed thereon remained due and unpaid prior to 1820; and that under the act entitled "An act providing for the remission of penalties and for the sale of lands for taxes," passed January 30, 1822, such proceedings were had against said premises that judgment was recovered in the court of common pleas of Madison county, at the November term thereof, 1823, for $\$276\frac{55}{100}$, the amount of taxes, interest, &c., then due. An order of sale was issued upon said judgment and the land offered for sale, and not sold for want of bidders, and return made in the premises to the auditor of State; and that said premises, under and by virtue of the said proceedings duly had under said act, became and was forfeited to the State of Ohio. That said premises being in arrear for taxes previous to the year 1820, and said taxes not being paid, except by the sale hereinafter mentioned, nor any of the accruing taxes afterwards, except by said sale hereinafter mentioned, such proceedings were duly had under the act entitled "An act for the remission of penalties and for the sale of
37 land for taxes," passed January 29, 1827, and the act entitled "An act supplementary to the act for the remission of penalties and for the sale of lands for taxes," passed February 11, 1829, (the auditor of Madison county having omitted to sell said lands for taxes on the second Monday of December, 1828,) that said lands were sold for the taxes due thereon prior to 1820, &c., to one Lyne Starling, to whom the auditor of said county executed a deed. Respondent will file and exhibit, on the hearing of this cause, such certified copies of the proceedings, &c., herein above referred to, as may be necessary. And respondent avers that under and by virtue of said proceedings, as he is advised by counsel and the decision of the supreme court, in bank, at their December term, A. D. 1849, and reported in the 18 vol. of the Ohio reports, page 400, et seq., a good, perfect, and valid title vested in the said Lyne Starling. The said deed to Lyne Starling was made in July, 1831, and the said Lyne Starling on the 30th day of April, 1832, conveyed said premises, by deed duly executed and acknowledged, (and for a valuable consideration then paid,) to respondent, who purchased without any knowledge or notice of the claim now set up by the complainants. Respondent went into possession immediately after said deed was made to him by said Lyne Starling, and respondent continued in possession until, a few years afterwards, one Cadwallader Wallace claimed about
38 220 acres of said premises on the south part thereof, the boundaries of which respondent is unable to give, and respondent supposing said Wallace had by prior entry and survey a paramount interfering title, yielded said 220 acres, or thereabouts, to said Wallace or his assignee, Valentine Wilson; and as to the residue of said premises respondent has been in possession of the same, claiming title thereto under said tax sale and said Lyne Starling ever since; and has paid taxes thereon since 1832, and made improvements by fencing, &c.

As to the title and litigation between said Niswanger and respondent, he is informed and believes the facts are briefly as follows:

About the year 1841 the said Christopher Niswanger brought an action of ejectment against respondent to recover said premises. This respondent set up his said title. This cause, after being decided in the common pleas, was by the supreme court reserved to the court in bank, where, after full agreement by counsel, it was (in accordance with what was urged by the counsel for said Niswanger) decided that although respondent's title might be a perfect equitable title, yet, as no patent had issued when respondent purchased, his remedy was in chancery, and that hec ould not set up his said title at law, and, on that ground a verdict and judgment was rendered against respondent at law.

Respondent, then being fully advised by the court in bank of
39 his rights and remedies, brought his suit in chancery to perfect his title as against said Niswanger. To this bill said Niswanger demurred, insisting, by his counsel, that if this respondent had any title it was a legal one, and his remedy was at law. This case was also reserved by the supreme court to the court in bank, who held that respondent's remedy was in chancery, and overruled the demurrer, and gave the said Niswanger leave to answer. The case was remanded; the said Niswanger answered, proofs and exhibits made, and the case again reserved to the court in bank. On the hearing the said Niswanger insisted that respondent's title was defective, and that his remedy was at law and not in chancery; the court in bank held that respondent's title was a good equitable title, and his remedy was in chancery and not at law. The said Niswanger then asked and obtained a rehearing on the question whether the respondent's remedy was in chancery or at law.

At the December term of the court in bank, 1851, and about seven years after the court in bank turned respondent into a court of chancery for relief, the said court in bank determined that respondent's title was a legal one and his remedy at law. And so respondent has at last discovered in 1851, by a decision of the court in bank, and after seeking said knowledge for the period of about seven years,
40 that at this time his remedy is at law; and respondent has commenced an action of ejectment in the court of common pleas of Madison against said Niswanger's heirs, which is now pending.

Respondent admits that the said Niswanger on the 20th of November, 1838, obtained a patent for said entry No. 6780 for 640 acres, a copy of which is filed, marked (D,) by complainants, and in which it is, among other things, recited, by the United States that warrants of Thomas Waters, Henry Punter, and Henry Lipscomb had been formerly located in the district of Kentucky and patented by the commonwealth of Virginia to the said David Ross, in trust for said David Ross & Co., which had since been lost by interference with a prior claim, to wit, Henderson's grant, and the said warrants withdrawn and relocated in the Virginia military district of Ohio. Whether the United States have truly recited the facts, respondent does not know. Respondent, at the time he purchased said land of said Lyne Starling,

was wholly ignorant of the nature of the title of the said Ross and others, nor does he now know anything about the acts and doings of said Ross and others, or of said Niswanger, in procuring a patent for said lands mentioned in said patent, and requires full proof as to all matters and allegations in said bill relating to the same.

41 Respondent denies that he is in possession of said land under said Niswanger, or his heirs, or that he ever was so in possession. Respondent admits that he has been anxious to quiet litigations, inasmuch as it has taken him near seven years of constant litigation to ascertain what court has jurisdiction of his rights, and has made propositions to said Niswanger's heirs to compromise; the terms of a compromise have been agreed upon between respondent and the guardian of the heirs of Niswanger, but no adjustment has as yet been consumated, nor, as he is advised by counsel, can he compromise or make any valid or binding agreement with said Niswanger's heirs without going into a court of equity. Respondent claims said premises under and by virtue of said tax sale.

At the time the survey was made of the Saunders entry, in 1837 or 1838, this respondent was in possession of said premises and heard about the time that said survey was being made; but the rights or claims of the parties interested in said survey respondent did not then and doth not now know, except from and as they are set up in said original bill, which bill respondent never read or heard read until within the last ten days, but had heard in conversation that said complainants complained that the Ross entry was invalid.

42 And as to all and each of the allegations set forth and made in said original bill and supplemental bill not herein answered, respondent has no knowledge and therefore denies the same and requires full proof.

Respondent denies all allegations of fraud, &c., and asks to be hence dismissed with his costs.

SWAN & ANDREWS,
Sol's for Def't.

THE STATE OF OHIO, *Franklin county, ss:*

Eli W. Gwynne, respondent above named, being duly sworn, makes oath that the matters set forth in the above answer, stated as from the information of others, he believes to be true, and that all other matters therein stated are true.

E. W. GWYNNE.

Sworn to and subscribed before me, this 29th day of March, 1854.
WILLIAM FIELD,
Jus. Peace in and for said county of Franklin.

Ans. of guard. ad litem.

The answer of Texas Niswanger and William T. Niswanger, infant defendants, by their guardian *ad litem*, Norman Gay, to the original bill and supplemental bill and bill of revivor of Mary D. Saunders and others.

The said infant defendants, answering by their said guardian
43 *ad litem*, he, said guardian, says that he is wholly unadvised as to the matters set up in said bills and cannot admit the allegations thereof, but prays that said complainants be held to proof of the same, and that the rights of his said infant wards be protected in the premises.

NORMAN GAY,
Guardian ad litem as aforesaid,
By his solicitors, STANBURY & ANDREWS.

Replication.

SAUNDERS and others
vs.
NISWANGER and others. } In chancery.—From Madison county.

And the complainants now come and say the matters and things set out in their several bills are true, and the matters and things set out in the several answers of the defendants are untrue, as they are ready to show to this honorable court.

P. B. WILCOX,
For Comp'ts.

And afterwards, to wit, at the December term, A. D. 1857, of the said supreme court this cause was continued.

And afterwards, to wit, at the December term of said supreme court, A. D. 1858, this cause was continued.

And afterwards, to wit, at the December term of said supreme court, A. D. 1859, this cause was continued.

44 And now, at this day, to wit, the day and year first herein above written, "came the parties, and this cause coming on to be heard upon the original bill, bill of revivor and amendments, the answers of the several defendants, replication, exhibits and testimony, was argued by counsel, as well on the one side as on the other; and thereupon the court here, being fully advised in the premises, do find the equity of the case to be with the complainants, and that so much of the land embraced in said Ross' entry, No. 6780, of 640 acres in Madison county, as is contained within the boundaries of said Saunders' entry, No. 13,884, of 428¼ acres, was at the time the said Saunders' entry was made open and vacant land, in nowise appropriated in law or equity by said Ross's entry, No. 6780, or by the survey or patent thereof, nor was the same liable to be sold for the taxes set forth and alledged in the answer of said Gwynne, but the same was then and there subject to be appropriated by the warrant of said Saunders, and that the said entry, survey, and patent of said Saunders were and are good and valid in law, and vested in said Saunders a good and valid title to the land embraced in said Saunders' entry, No. 13,884. It is therefore ordered, adjudged, and decreed by the court here that said defendants, within thirty days after the entry of this decree, by a good and sufficient deed or deeds, transfer and release
45 to the complainants all their claim and demand of, in, and to the said lands contained within the boundaries of said Saunders' en-

try, No. 13,884; and in default of such deed or deeds, then this decree shall operate as such transfer and release, according to the statute in such case made and provided; and that said entry, No. 6780, and the said survey and patents therefor, so far as the same interferes with said Saunders' entry, No. 12,884, were and are void in law, and that the said defendants, and each and every of them, shall be, and are hereby, enjoined from using or in anywise setting up said entry, No. 6780, and survey and patent thereon, or either of them, against said complainants so far as the same interferes with said Saunders' entry, No. 13,884. And it is further ordered, adjudged, and decreed by the court here that a writ of possession upon their motion issue in favor of said complainants. And it is further ordered that the infant defendants have twelve months after they arrive at age to impeach this decree. The complainants make application for the benefit of the occupying claimant's law. And it is further ordered that this cause be remanded to the court of common pleas of Madison county to carry this decree into execution, and to hear said application for the benefit of the occupying claimant law; but nothing in this order is to be con-
46 strued as an expression of the opinion of this court, whether the occupying claimant law applies to this case or not. Upon application of the defendants in this case it is by the court here certified:

1st. That this is the highest court of law or equity in the State of Ohio in which a decision of this suit could be had.

2nd. That the validity of the said entry, No. 67[illegible] name of said David Ross, assignee in trust for Dav[illegible] bearing date May 21st, 1810, and the survey thereof [illegible] 49 corded, under which the said defendants claimed titl[illegible] question, and that said defendants set up and relied viso contained in the first section of the act, entitled tend the time for locating Virginia military warrant surveys thereon to the office of the Secretary of the War, and appropriating lands for the use of schools military reservation in lieu of those heretofore appro by the Congress of the United States, and approved and upon the proviso contained in the first section of "An act to extend the time for locating Virginia m rants, and for returning the surveys thereon to the Department of War," passed by the Congre
47 States, and approved March 16, 1810; and contained in the first section of the act, entitle extending the time for locating Virginia military returning the surveys thereon to the general land o the Congress of the United States, and approved N and that the construction of said provisos were dra this case, and the said defendants claimed protect and survey under said provisos, but the court here o so set up and held that the said provisos did not nor protect the said entry and survey, and that the sam[illegible] and did not appropriate the land covered by the same because of the said prior entry and survey in Kentucky and the prior patent there-

The said infant defendants, answering by their said guardian
43 *ad litem*, he, said guardian, says that he is wholly unadvised as to the matters set up in said bills and cannot admit the allegations thereof, but prays that said complainants be held to proof of the same, and that the rights of his said infant wards be protected in the premises.

NORMAN GAY,
Guardian ad litem as aforesaid,
By his solicitors, STANBURY & ANDREWS.

Replication.

SAUNDERS and others
vs.
NISWANGER and others. } In chancery.—From Madison county.

And the complainants now come and say the matters and things set out in their several bills are true, and the matters and things set out in the several answers of the defendants are untrue, as they are ready to show to this honorable court.

P. B. WILCOX,
For Comp'ts.

And afterwards, to wit, at the December term, A. D. 1857, of the said supreme court this cause was continued.

And afterwards, to wit, at the December term of said supreme court, A. D. 1858, this cause was continued.

And afterwards, to wit, at the December term of said supreme court, A. D. 1859, this cause was continued.

44 And now, at this day, to wit, the day and year first herein above written, "came the parties, and this cause coming on to be heard upon the original bill, bill of revivor and amendments, the answers of the several defendants, replication, exhibits and testimony, was argued by counsel, as well on the one side as on the other; and thereupon the court here, being fully advised in the premises, do find the equity of the case to be with the complainants, and that so much of the land embraced in said Ross' entry, No. 6780, of 640 acres in Madison county, as is contained within the boundaries of said Saunders' entry, No. 13,884, of 428⅓ acres, was at the time the said Saunders' entry was made open and vacant land, in nowise appropriated in law or equity by said Ross's entry, No. 6780, or by the survey or patent thereof, nor was the same liable to be sold for the taxes set forth and alledged in the answer of said Gwynne, but the same was then and there subject to be appropriated by the warrant of said Saunders, and that the said entry, survey, and patent of said Saunders were and are good and valid in law, and vested in said Saunders a good and valid title to the land embraced in said Saunders' entry, No. 13,884. It is therefore ordered, adjudged, and decreed by the court here that said defendants, within thirty days after the entry of this decree, by a good and sufficient deed or deeds, transfer and release
45 to the complainants all their claim and demand of, in, and to the said lands contained within the boundaries of said Saunders' en-

try, No. 13,884; and in default of such deed or deeds, then this decree shall operate as such transfer and release, according to the statute in such case made and provided; and that said entry, No. 6780, and the said survey and patents therefor, so far as the same interferes with said Saunders' entry, No. 12,884, were and are void in law, and that the said defendants, and each and every of them, shall be, and are hereby, enjoined from using or in anywise setting up said entry, No. 6780, and survey and patent thereon, or either of them, against said complainants so far as the same interferes with said Saunders' entry, No. 13,884. And it is further ordered, adjudged, and decreed by the court here that a writ of possession upon their motion issue in favor of said complainants. And it is further ordered that the infant defendants have twelve months after they arrive at age to impeach this decree. The complainants make application for the benefit of the occupying claimant's law. And it is further ordered that this cause be remanded to the court of common pleas of Madison county to carry this decree into execution, and to hear said application for the benefit of the occupying claimant law; but nothing in this order is to be con-
46 strued as an expression of the opinion of this court, whether the occupying claimant law applies to this case or not. Upon application of the defendants in this case it is by the court here certified:

1st. That this is the highest court of law or equity in the State of Ohio in which a decision of this suit could be had.

2nd. That the validity of the said entry, No. 6780, made in the name of said David Ross, assignee in trust for David Ross & Co., bearing date May 21st, 1810, and the survey thereof so made and recorded, under which the said defendants claimed title were drawn in question, and that said defendants set up and relied upon the proviso contained in the first section of the act, entitled "An act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the Secretary of the Department of War, and appropriating lands for the use of schools in the Virginia military reservation in lieu of those heretofore appropriated," passed by the Congress of the United States, and approved March 2, 1807 and upon the proviso contained in the first section of the act, entitled "An act to extend the time for locating Virginia military land warrants, and for returning the surveys thereon to the Secretary of the Department of War," passed by the Congress of the United
47 States, and approved March 16, 1810; and upon the proviso contained in the first section of the act, entitled "An act further extending the time for locating Virginia military warrants, and for returning the surveys thereon to the general land office," passed by the Congress of the United States, and approved November 3, 1814; and that the construction of said provisos were drawn in question in this case, and the said defendants claimed protection for said entry and survey under said provisos, but the court here overruled the claim so set up and held that the said provisos did not nor did either of them protect the said entry and survey, and that the same were totally void and did not appropriate the land covered by the same because of the said prior entry and survey in Kentucky and the prior patent there-

for, but that notwithstanding the said entry, No. 6780, and survey thereon, and the said provisos or either of them, the said land so covered thereby was wholly vacant and unappropriated, and was subject to the entry and appropriation thereof so made by said Samuel Hyde Saunders, the ancestor of the plaintiffs, and upon that ground this was decided against the said defendants.

48 THE STATE OF OHIO, *ss:*

I, James H. Smith, clerk of the supreme court of the State Ohio, by H. S. Miller, deputy clerk of said court, hereby certify that the foregoing is truly taken and copied from the records of the proceedings of the supreme court of said State.

In testimony whereof, I do hereto subscribe my name and affix the [SEAL.] seal of said court at the city of Columbus, this 24th day of April, A. D. 1861.

JAS. H. SMITH, *Clerk*,
By H. S. MILLER, *Dep'ty C'k.*

I allow a writ of error in this case.

JOSIAH SCOTT,
Ch. J. of the Supreme Court of Ohio.

SUPREME COURT OF THE UNITED STATES.

49 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the Supreme Court of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a decree in a plea which is in the said supreme court before you, between Mary D. Saunders, widow, and Paulina W. B. Saunders, Gamaliel I. Saunders, and Martina Saunders, infants, by their next friend, Francis Asbury, plaintiffs, and Texas Niswanger and William T. Niswanger, infants, by their guardian *ad litem*, Norman Gay, and Norman Gay and Lydia C. Gay, William T. Martin, and Eli W. Gwynne, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first Monday in the month of December next in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this eighteenth day of [SEAL.] December, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States of America the eighty-sixth.

Attest: JOHN McLEAN, *Clerk.*

I allow a writ of error in the above case. Dec. 18, 1861.

H. H. LEAVITT,
Judge circuit court of the United States.

50 THE UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

To Mary D. Saunders, widow, and Paulina W. B. Saunders, Gamaliel I. Saunders, and Martina Saunders, infants, and Francis Asbury, their next friend, greeting:

Whereas, Texas Niswanger, and Wm. T. Niswanger, infants, by their guardian *ad litem*, Norman Gay, and Norman Gay, Lydia C. Gay, William T. Martin, and Eli W. Gwyne, have obtained the allowance of our writ of error to the judges of the supreme court of Ohio, directed to remove into the said Supreme Court, to be holden at the city of Washington on the first Monday in the month of December next, the record of a certain plaint, process, proceedings, and decree in chancery, wherein you the said Mary D. Saunders and said other parties were plaintiffs, in that action lately recovered against the said Texas Niswanger and the said other named parties as defendants, a certain decree, and costs, as by the said record in the said suit remaining appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said Texas Niswanger and the said other defendants we are informed, and our said writ of error granted, issued, and allowed as aforesaid, for the purpose of correcting the errors aforesaid alledged, if any there be. You are, therefore, hereby commanded and cited, to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the first Monday in the month of December next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

Witness, the honorable Roger B. Taney, chief justice of the United States of America, this 18th day of December, in the year [SEAL.] of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States of America the 86th.

Attest: JOHN McLEAN,
Cl'k U. S. Circuit Court, Southern Dist. of Ohio.

51 Received this writ Feb'y 4th, A. D. 1862, and I served Mary D. Saunders (widow,) personally, by handing her a certified copy of the within, on the 5th day of Feb'y, 1862, and Palina W. B.

Saunders, and Gamaliel I. Saunders, (should by Gamaliel W.) they being of age, I served them same day personally, by handing each of them a certified copy of the within. Martina Saunders died some time ago without heirs, and Francis Asbury is dead.

3 services	$6 00
5 copies	2 50
105 miles	6 00
	$14 80

A. C. SANDS, *U. S. Marshal*,
By E. McCORMACK, *Dep't.*

52 Know all men by these presents that we, Henry C. Noble and John W. Andrews, of Columbus, Franklin co., Ohio, are held and firmly bound unto Mary D. Saunders, Paulina W. B. Saunders, Gamalial J. Saunders and Martina Saunders in the penal sum of one thousand dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators.

Sealed with our seals, and dated this 8th day of March, A.D. 1862.

The condition of the above obligation is such that whereas Texas Niswanger and William T. Niswanger, Norman Gay, Lydia C. Gay, William T. Martin, and Eli W. Gwynne, have obtained an allowance of a writ of error upon a certain decree in chancery, recovered against them by the said Mary D. Sanders, Paulina W. B. Sanders, Gamalial J. Saunders and Martina Sanders, infants, by their next friend, Francis Asbury, in the supreme court of the State of Ohio, to the Supreme Court of the United States. Now, if the said Texas Niswanger, William T. Niswanger, Norman Gay, Lydia C. Gay,
53 William T. Martin and Eli W. Gwynne shall pay the full amount of the condemnation in said Supreme Court of the United States and costs, in case a decree shall be entered in favor of the appellees, then this obligation shall be void, otherwise in full force and virtue in law.

HENRY C. NOBLE. [SEAL.]
JOHN W. ANDREWS. [SEAL.]

Approved by *Approved by* me, March 8, 1862,
MILTON SUTLIFF,
Chief Justice of the Supreme Court of Ohio.

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SUPREME COURT UNITED STATES.

No. 125.

TEXAS NISWANGER AND OTHERS
Plaintiffs in Error.

vs.

MARY D. SAUNDERS AND OTHERS.
Defendants in Error.

H. STANBERY,

Brief for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

NO. 125.

TEXAS NISWANGER, ET AL.

v.

MARY D. SANDERS, ET AL.

This is a writ of error to the Supreme Court of the State of Ohio.

The case below was upon a bill in chancery, brought by the defendants in error against the plaintiffs in error, to quiet the title to a tract of 428 acres in the Virginia Military District, in Madison county, Ohio.

It appears that the respective parties have patents from the United States for the land in controversy, both patents bearing the same date, November 20, 1838. Record, pp. 9, 10.

It also appears, that the entry under which defendants in error claim, was made on the 12th day of April, 1837, and that the entry under which the plaintiffs in error claim, was made on the 21st day of May, 1810, and surveyed April 26, 1816. Record, pp. 8, 12.

As the patents are of even date, and our entry is the

older, the *prima facie* showing is in our favor, and the *onus* is upon the defendants in error to impeach that entry.

Accordingly they denied by their bill that our entry was invalid from its date; or if valid then, that it was subsequently withdrawn, so that either way, the land in controversy was vacant, and subject to their entry in 1837.

It was upon the first ground, that is to say, that our entry was void from the beginning, that the Supreme Court of Ohio decided this case against us, as expressly appears in the certificate. Record, pp. 23, 24.

The facts touching our entry, as shown by the record, are as follows:

On the 21st of July, 1784, David Ross & Co. made an entry of 1,000 acres on several military warrants, which entry was surveyed November 17, 1784. Record, pp. 12.

It appears from a recital in our patents, that this 1,000 acres lies in the District of Kentucky, that the entry was made upon the same warrants on which, in part, our subsequent entry of 1810 was made; that this Kentucky entry was patented to Ross by the State of Virginia, that it was subsequently lost by interference with a prior claim, and the warrants were withdrawn, and 640 acres of them re-entered in Ohio. Record, pp. 11.

This 640 acres is our entry of 1810, which includes the land in controversy, and is numbered 6780.

Upon this state of facts the Supreme Court of Ohio held our entry, No. 6780, and our survey of the same, "to be void in law."

The certificate of the Court shows, that the validity of our entry No. 6780, and the survey thereof, were drawn in question, that we relied upon the provisos of 1807, and similar provisos in subsequent acts of Congress, that the construction of these provisos was drawn in question, that the Court overruled the defense so set up, and held that

our said entry and survey were totally void, and did not appropriate the land covered by them, "because of the said prior entry and survey in Kentucky, and the prior patent therefor, but that notwithstanding the said entry No. 6780 and survey thereon, and the said provisos on either of them, the said land so covered thereby, was wholly vacant and unappropriated, and was subject to the entry and appropriation thereof, so made by Samuel Hyde Sanders, the ancestor of the plaintiffs, and upon that ground this (case) was decided against the said defendants." Record, pp. 23, 24.

In thus holding our entry and survey of 1810 to be void, the Supreme Court of Ohio has followed one of its own decisions. *Niswanger* v. *Wallace*, 16 Ohio Reports, 557.

If this case was to be ruled by Ohio decisions and Ohio laws, we should have no standing in this Court, but it happens that the question involved arises under Federal laws, and its settlement is finally with this tribunal, and by this tribunal it has been so settled.

I refer to the case of *Jackson* v. *Clark*, 1 Peter's Rep. 628.

It appeared in that case that an entry was set up by the defendants, Clark *et al.*, on the land in controversy, made July 19, 1796. The plaintiffs attempted to overcome this entry, by showing that two prior entries had been made upon the same warrants, both of which had been patented. There was no evidence of any withdrawal of the two prior entries, or of any surrender or cancellation of the patents. So that the case presented the naked question of a re-entry on a satisfied warrant, satisfied by prior entries carried into grant without withdrawal or cancellation. The Court expressly sanctions the last entry, and holds, that however irregular or unauthorized it may

have been, yet the land covered by it was effectually withdrawn from entry by any other locator.

It is singular, that although *Niswanger* v. *Wallace*, 16 Ohio, 557, was decided long after this case of *Jackson* v. *Clark*, yet it was completely overlooked by counsel and by the Court. They did not know it had been expressly decided by this Court, that an entry made in Ohio on warrants satisfied by a prior entry and patent in Kentucky, was valid, that it was protected by the proviso of 1807, and that the land covered by it could not be touched by a second locator. Undoubtedly such an entry, without a withdrawal, is irregular, but that is a question between the United States and the owners of the entry, and a subsequent location can not intervene.

The Court will not fail to see that our entry of 1810 stands upon a better foundation than the entry so held valid in *Jackson* v. *Clark*, for it appears from the records of the principal surveyor (Record, p. 12), that the 640 acres were regularly marked "withdrawn" from the Kentucky entry; and it further appears from the recitals of our patent (Record, p. 11) that the 640 acres so withdrawn had been lost by interference with a prior claim.

Surely, if the proviso of 1807 does not protect such an entry and its survey from another locator, it would be of little efficiency.

It seems to me that I could well rest this case upon the authority of *Jackson* v. *Clark*, but out of abundant caution I will proceed to a more careful consideration of the facts of the case and of the decisions of this Court. If I am not greatly mistaken, the error of the Supreme Court of Ohio will be quite manifest.

The single question in this case turns on the validity of the entry of May 21, 1810, in the name of David Ross & Co. That entry was surveyed April 26, 1816. If the

entry so made and surveyed is not an absolute nullity—if it is not totally void, but only irregular, it is conceded in the opinion of the Supreme Court of Ohio that our title is the best.

What then are the facts?

In 1784, David Ross & Co. entered 1000 acres on several military land warrants in the District of Kentucky, which entry was surveyed and patented by the State of Virginia, After the patent, 640 acres of the entry was lost by interference with Henderson's Grant. Thereupon, this 640 acres was withdrawn from the original entry and re-entered in 1810 on the land in controversy, situate in Ohio, and then vacant. This entry of 1810 was surveyed in 1816. In 1837, twenty-seven years after our entry, and twenty-one years after our survey, Sanders, under whom the defendants in error claim, made an entry on 428 acres of the land covered by our entry of 1810.

The Court below decide the case against us, as I have said, on the ground that our entry of 1810 and our survey of 1816 were nullities, and therefore not within the savings of the proviso in the act of 1807 and the subsequent acts containing the same proviso. They are nullities, say the Court, because warrants under which they were made, were satisfied by the original entry of 1784, and merged in the patent granted on that entry. The Court, however, clearly admits that if there was an equitable right to make this re-location, and the manner of enforcing the right were only irregular, the proviso would protect us.

Now, the first answer to this objection to our title is, that to the extent of the 640 acres in Henderson's Grant, there was no satisfaction, and no merger.

The matter may be very plainly put thus: The State of Virginia granted to certain soldiers 1,000 acres of warrants, to be satisfied by entry or location upon certain

lands which the State then owned on the southwest side of the Ohio River. The warrants did not describe or grant any specific tracts, but were addressed to a public officer, the surveyor of the district, and authorized him "to survey and lay off into one or more surveys" the quantity of acres named in the warrants, in the lands "set apart for the officers and soldiers of the Commonwealth of Virginia."

It happened that in laying off and surveying this 1000 acres, 640 acres was laid off within the bounds of a well-known tract of country called *Henderson's Grant*. Not an acre of land within that grant belonged to Virginia in 1784. It had been, prior to that date, granted by Virginia to Henderson. Besides this, by the very act of Virginia, passed in May, 1799, authorizing entries under military warrants, it was specially provided, that "no entry or location of land shall be admitted within the country or limits of the Cherokee Indians, or on the northwest side of the Ohio River; or on the lands reserved by act of assembly for any particular nation or tribe of Indians; or on the lands granted by law to Richard Henderson & Company."

What then was the effect of the entry of this 640 acres within Henderson's Grant?

The Supreme Court of Ohio calls it a *satisfaction* of the warrants to that amount. That Court says that this entry having been carried into patent, the warrants which were *satisfied* by the entry became *merged* in the patent, and thenceforth were *functus officio*.

This Court, however, in *Porterfield* v. *Clark*, 2 *Howard*, characterizes such an entry as void. The language of Mr. Justice Catron, delivering the opinion in that case, is as follows:

"If Clark's entry was made, however, on lands reserved from location by the act of 1799, then it is void, because

the act did not open the land office for such purpose, nor extend to the excepted lands."

In so far, then, as the entry of 1784 covered land in Henderson's Grant, the entry to that extent was merely void. It did not satisfy the warrants. It did not *quoad* the land in Henderson's Grant, pay the debt which Virginia had assumed to pay to her soldiers, for Virginia could only pay her debt or bounty from her own lands, and not out of lands belonging to others. It is, therefore, quite inadmissible to call this entry a satisfaction of the warrants, or to call the patent a merger of the warrants. Neither the entry, the survey, nor the patent of this 640 acres gave to Ross a scintilla of title. The land did not belong to Virginia, and could not be touched by the warrants issued by Virginia, nor be conveyed or granted by her patent. The whole thing was void from beginning to end, and the original right to the 640 acres remained untouched by satisfaction or merger.

In this state of things, upon finding that 640 acres of the entry was in Henderson's Grant, Ross was certainly entitled to relief in some form. He had in good faith surrendered his warrants to Virginia under the idea that they were satisfied out of lands belonging to Virginia. The officers of Virginia acted upon the same impression, and received the surrender of the warrants and delivered to Ross a grant from Virginia for those 640 acres in the shape of a patent. The warrants so surrendered perhaps remain in the archives of Virginia—or it may be they are canceled, or lost. It is of little consequence what has become of them, for the patent recites and describes them with all necessary certainty, and fortunately for Ross that patent was delivered to him when he surrendered his warrants. We know exactly from that patent the number and amount of each of the warrants, the name of each warrantee,

the number of the survey and the amount of the same, and the description of the land.

When Ross discovered that 640 acres of the land patented to him was in Henderson's Grant, what was he to do? The Supreme Court of Ohio, does not say what he should have done, but only says that what he did do was a nullity. That Court does not say that he should have applied at the proper office in Richmond for a re-delivery of the 640 acres of warrrants—on the contrary it is said by the Court that "we are not satisfied that there was, in Virginia, an officer or tribunal, or any authority except the Legislature, that could have revived the warrants, which were merged in and satisfied by the patent."

Considering that this was a case in equity, it is a little strange that the doctrine of merger and satisfaction should have been so applied. Was this anything other than the case of a contract by vendor to convey, and a surrender of the contract upon a conveyance made and received in good faith, but covering land not intended to be conveyed and belonging to another? Under such a mistake is the contract satisfied or merged in the conveyance? Surely not in a Court of Equity.

Our right then was not lost; our right to have 640 acres of land belonging to Virginia and subject to entry, was not gone. How then were we to be relieved? There certainly was some course fit to be pursued, and what course more fit than the one that was pursued.

Ross appeared before the principal surveyor of the Military District, and made proof to the satisfaction of that officer, that 640 acres of the entry of 1784, fell within Henderson's Grant. Ross also exhibited to the same officer, the patent which he had received from Virginia, showing that he was the party who had surrendered the warrants, and was entitled to have the quantity of 1000

acres covered by the warrants. Thereupon the principal surveyor allowed Ross to withdraw or amend the entry of 1784 to the extent of the 640 acres and to re-enter the same quantity on vacant lands, subject to entry in the State of Ohio. This was our entry of 1810 which is called a nullity.

It is said, by the Court below, that there is no satisfactory proof that the 640 acres was within Henderson's Grant, and in reference to the memorandum opposite the entry of 1784, "640 withdrawn and re-entered in 191," the Court says: "By whom or by what authority this memorandum was made, does not appear. It is not certified to us and does not appear to have been certified to the surveyor in Ohio, as the official act of any officer in Virginia."

I have only to say, that this memorandum is itself an official act of the principal surveyor, Richard C. Anderson, and upon the same sort of official *memoranda* all the titles depend to lands in the Virginia Military Districts. Besides this, in the patent granted by the United States on the entry of 1810 (which item of evidence was made an exhibit of the bill), the facts of interference with Henderson, withdrawal, and re-entry of the 640 acres are all recited and recognized. After all this, it is too late to question the verity of this memorandum.

We must, therefore, take it as established that the entry of 1810 was made upon warrants never before satisfied. What then is the objection to that entry? It simply amounts to a matter of form—to a question as to the manner, rather than the substance. The Court below says this entry was made upon the patent and not on the warrants. Certainly the warrants were not before the principal surveyor, nor in his office, but the patent was produced, and with this patent, and his own records, and the proof of

interference with Henderson, he had all the facts before him. It was evident he had committed a mistake in allowing the 640 acres to be located out of his district, upon lands not subject to entry; and it was further evident that Ross' warrants were, to that extent, unsatisfied. By allowing the withdrawal and re-entry, he rectified the mistake and for the first time satisfied the warrants.

Can a reason be suggested why the warrants should have been in the office of the surveyor when the mistake was corrected? I have shown that the warrants were simply an authority to the surveyor. These warrants he had seen, and he had attempted to comply with their directions. He had, in his official records, a full description of these same warrants. They had been surrendered to him and he in turn had sent them to Richmond to be surrendered finally upon the granting of the patent. Was there any danger of loss or prejudice to Virginia or to any person in not requiring the warrants to be again produced and surrendered? Did they stand on the footing of negotiable paper, liable to get into circulation after payment without cancellation? Certainly not. They were surrendered, and, after the re-entry in 1810, never could be used for any other purpose—for they could only be used by entry on the Book of Entries, which book showed they were satfied by the re-entry of 1810. I admit that a subsisting, unsatisfied warrant ought to exist as the foundation of an entry. That is quite another thing from the objection we are now considering, which is the non-production of the warrants at the time of the entry. Certainly, if the warrants were unsatisfied at the date of the re-entry, it is mere matter of form whether they were in the office or not.

This brings us back to the main objection made by the Court below, to-wit., that our warrants were satisfied by

the entry of 1784, and merged in the patent issued upon that entry, and so had become *functus officio*, not to be *revived* by "any officer or tribunal, or any authority except the legislature."

It has been shown already by the case of *Porterfield* v. *Clark*, that the entry on Henderson, which is the foundation of all this satisfaction and merger, was itself a nullity. When we begin with a void act, it is of no moment how much is done in the way of mere confirmation; and surely if the entry was void, because Virginia did not own the land, the patent could not give any better title than the entry—"*ubi donatio nulla est, nec valebit confirmatio.*"

The cases in this Court go to that extent. In *Stoddard* v. *Chambers*, 2 Howard, 284, it is said: "The issuing of a patent is a ministerial act which must be performed according to law. A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual." The patent to Ross covered land which Virginia had before granted to Henderson; it was, therefore, "utterly void and inoperative" as to the 640 acres. That being so, it did not confirm the void entry; and it did not destroy our warrants, by merger or otherwise, for such effect would give it vitality and operation.

See also on this point, *Polk's lessee* v. *Wendall*, 9 Cranch, 99; *Patterson* v. *Winn*, 11 *Wheaton*, 358, and the late case in 1 *Black*.

I do not deny that the patent issued by Virginia to Ross, upon the entry of 1784, was good as to the 360 acres outside of Henderson; nor do I deny that the entry and patent did satisfy and merge the warrants as to the 360 acres; but all that does not help so much of the patent as purports to grant the 640 acres—for a patent may be good in part and void in part. C. J. Marshall, in *Patterson* v. *Jenks*, 2 Peters, 216, 235, says: "In the na-

ture of the thing we perceive no reason why the grant should not be good for land which it might lawfully pass, and void as to that part of the tract for the granting of which the office had not been opened."

See also *Winn* v. *Patterson*, 9 Peters, 680.

Hitherto I have considered the question of the validity of our entry of 1810 upon its own merits, and without reference to the legislation of Congress, intended to heal defects in the Military District.

This curative legislation began with the *proviso* in the act of 1807, in these words:

"That no locations as aforesaid within the above mentioned tract, shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void."

It is clear that, according to the *letter* of this proviso, our entry and survey was protected from the subsequent entry of Sanders—for our entry had been made and surveyed before Sanders made his entry. The question, however, at once arises upon this proviso, whether the construction is to be according to the letter, so as to protect all surveys, however contrary to law and destitute of foundation. One thing was clear. The proviso was intended to have a curative operation—for no legislation was necessary to secure a valid entry and survey from a subsequent location. It was, therefore, intended to protect and save such entries and surveys as might otherwise be lost. But the range of the proviso was matter of doubt, and whether it should protect *all* surveys, or only such as had some equi-

table foundation, was soon made a question. Five leading cases in this Court have settled all these doubts and fixed the construction. The case first in order of time, was *Taylor* v. *Meyers*, 7 Wheat. 23. In that case the first survey had been withdrawn before the second location was made. The Court held that, after the withdrawal, there was *no* survey upon which the proviso could operate. The language used is as follows: "The proviso of that act, which annuls all locations made on lands previously surveyed, applies to subsisting surveys, to those in which an interest is claimed; not to those which have been abandoned, and in which no person has an interest."

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On page 636, it is said by C. J. Marshall: "If it be conceded that this proviso was not intended for the protection of surveys which were, in themselves, absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity."

Again, on page 638: "A survey made by the proper officer, professing to be made on real warrants, bearing on its face every mark of regularity and validity, presented a barrier to the approach of the locator, which he was not permitted to pass, and which he was not at liberty to examine."

In our case, it appears that the entry and survey of 1810, were made by the proper officer, professedly on real warrants, and with every mark of regularity. If the entry and survey in *Jackson* v. *Clark* fell within the protection of the proviso, how can ours be excluded ?

If the absence of the warrants at the date of the re-entry is fatal to us, it would have been fatal in that case, for it appears that the warrants had been satisfied and fully appropriated by a prior location and were not *withdrawn* from that prior location. Whereas, in our case, it was entered on the record that our warrants were withdrawn. Again, in *Jackson* v. *Clark*, the first entry and survey were valid and on land subject to appropriation under the warrants. Whereas, in our case, the first entry and survey were not valid, nor on land subject to appropriation.

Lindsay v. *Miller*, 6 Peters, 666, comes next: In this case it was held that the proviso was not a protection for a survey made under a State line warrant. The Court referring to the proviso, says: "This language is general, and literally applies to all surveys, which had been previously made, whether made with or without authority. Could Congress have designed by this act to protect surveys which had been made without the semblance of authority? If an intruder, without a warrant, had marked boundaries within a survey, either large or small, would it be protected under the act?" Again, on page 676: "To cure defects in entries and surveys was the design of the act of 1807. It was intended to sanction irregularities which had occurred without fraud, in the pursuit of a legal title."

Our entry and survey were not made under State line warrants, nor without semblance of authority; and Ross was guilty of no fraud and was in the lawful pursuit of a valid title.

Galloway v. *Finley*, 12 Peters, 294: In this case the Court gave a larger operation to the proviso than had been stated in *Lindsey* v. *Miller*. *Mr. Justice Catron*, delivering the opinion, says on page 298: "It is insisted for the appellant that the section had reference to imperfect and not void titles. The Legislature merely affirmed a principle not open to question, if this be the true construction. Had an effective patent been issued, the Government would not have had any title remaining, and a second grant would have been void of course. Something more undoubtedly was intended than the protection of defective, yet valid, surveys and patents—this is not denied but the argument insists only irregularities were intended to be covered." "The statute is general, including by name all grants, not distinguishing between void and valid, and the plainest rules of propriety and justice require that the Courts should not introduce an exception, the Legislature having made none." The learned judge then refers to *Lindsey* v. *Miller*, and adds, in reference to that case: "But had the claimant been entitled to the satisfaction of his warrant in the Military District, in common with others for whom the Government held as trustee, the case might have been very different, even had the entry and survey been invalid."

The case of *McArther* v. *Dean*, 7 How. 264, follows, and affixes the enlarged operation of the proviso as declared in *Galloway* v. *Finley*, and expressly says an entry and survey in the name of a deceased person, is within the scope of the proviso, notwithstanding such an entry and survey had been repeatedly held to be void.

It was in reference to these decisions that the Supreme Court of Ohio held, in the case of *Stubblefield* v. *Boggs*, 2 Ohio State Reports, 519, as follows:

"That by the proviso to the act of 1807, re-enacted

from time to time, it has withheld from location all lands previously patented or surveyed, whether the entries and surveys are valid or void, and has declared that any patent that may be obtained in virtue of a subsequent location of lands covered by a subsisting survey or patent, shall be null and void. Hence, it is of no consequence, whether the previous entry and survey have any validity or not. Admit that they are void, and that consequently the title both legal and equitable, remains in the Government, yet the subsequent location is a nullity, because Congress has so declared it."

Such is the view taken by the Supreme Court of Ohio, in 1853, on the scope of the proviso. The case of the plaintiffs in error does not require such perfect work of the proviso, for our entry and survey were not nullities, nor void, but an honest appropriation of so much land upon warrants never before satisfied. The utmost that can be said is, that there was some irregularity in mere matter of form, that is in allowing the re-entry of 1810 when the warrants were not present. I do not admit that this was even an irregularity. The whole matter was transacted by the principal surveyor. He was the proper officer before whom the loss by interference with Henderson was to be shown. It was shown to his satisfaction, as appears by the official memorandum of *the withdrawal*, and the re-entry in 1810. He had all the evidence in his office to show what warrants were so lost by interference. The actual production of the warrants would not have added one particle of force to the facts then known and established. Now without the aid of the proviso I would not fear, in a Court of Equity, to sustain the title of Ross against that of Sanders, for I am satisfied the Court would have raised every presumption in favor of the acts of the principal surveyor, and even of that act by which

he allowed the recitals in the patent to take the place of the warrants. In fact, I undertake to say, that an entry upon the patent, without the production of the warrants, has, in case of loss by interference, been the established usage of the Military Landoffice, aud that innumerable titles were acquired under that usage. There is no law or custom which requires the production of the warrants. Nor was there any known mode of obtaining them, for they had been surrendered, and perhaps canceled, under the mistaken idea of actual satisfaction, and would not be reclaimed. The Ohio Court says, no executive or ministerial officer was authorized to give them back, and nothing but an act of the Legislature could authorize their return

This being the state of *the law*, it was necessary for the, principal surveyor to act upon the patent, or he could not act at all.

Furthermore, the principal surveyor had no discretion about acting, whenever loss by interference was shown. The act of Congress, of May 13, 1800, gives "in every case of interfering claims," as well as those standing on entry or survey, as those which have gone into grant, the right to withdraw and re-enter on vacant lands. S[illegible] it is not necessary to go to Virginia for authority to withdraw warrants surrendered at her land-office. The only *withdrawal* that is necessary, is to be made on the books of the principal surveyor, and when that is made, the right to re-entry follows of course.

Finally, as to this objection of the re-entry without the actual production of the warrants, it well appears that the Government sustained it by granting a patent for the land so appropriated.

If this Court should be of opinion with the plaintiffs in error, that our entry and survey of 1810 and 1816 were

protected by the *proviso*, there is an end of this case, for that is the only question before the Court.

It is true that in the State Court it was insisted that our entry of 1810 was abandoned prior to the entry made by Sanders. The record, however, shows that the case was decided exclusively on the first ground, and as that is the only question over which this Court has jurisdiction, I take it to be wholly unnecessary to look into the other question. It will be time enough to consider that when the case goes back to the State Court. Indeed the evidence bearing upon that question is in great part omitted in the transcript sent to this Court.

In *Montgomery* v. *Hermander*, 12 Wheat. 132, it is held in reference to cases under the 25th section of the judiciary act, that "under these provisions we have no authority to re-examine the whole case. We can re-examine so much, and such parts of it only as come within some one or other of the classes of questions enumerated in the act of Congress, and so much of the case as must necessarily be decided to arrive at such question." See also *Neilson* v. *Lagow*, 12 How. 110.

It would seem, therefore, that in this class of cases, where the decision in the Court below was based exclusively on the point involving the Federal jurisdiction, this Court will not consider any other point in the case.

These cases do not fall within the common rule that the appellate Court will not reverse, when the decision of the Court below was right as to the case, but wrong upon the point decided.

This peculiarity rests upon sound reason; the jurisdiction is limited to the single question under Federal law. It is the function of this Court to decide this question and no other. Over all other questions the State Court has exclusive cognizance. So much of the case as depends upon

other questions is not as to this Court *coram judice*. Where therefore, there is in the case a question under Federal law, and a question not under Federal law, and the decision of the Court below is limited to the question under Federal law, and this Court is satisfied that the decision is erroneous, this Court can do nothing but reverse upon the point decided and remand the case to the State Court for further proceedings upon the point left open. It has no jurisdiction of the case except for the decision of the Federal question, and if it should pass beyond that into general questions, it at once touches upon State Court jurisdiction, and decides a question of State jurisdiction, which could never come before the Federal tribunul either directly or indirectly.

Suppose the State Court has decided the case against the plaintiffs in error, on the Federal question, and also on the question at large, this Court, though satisfied that the decision was erroneous on both grounds, can not reverse, for that would be going beyond the Federal question.

In any way the case can be put, it seems to me, this is not the place to consider the question left open expressly by the State Court as to the abandonment of the survey.

Out of abundant caution, I will only say, that our entry of 1810 has never been withdrawn or abandoned. It stands to this day on the books of the principal surveyor without any mark of withdrawal about it, and the United States has granted us a patent upon it as a valid and subsisting entry.

No authority is shown for the re-entries made in Ross' name, in 1820. Ross was then dead. It is pretended that the executors have since conveyed this land covered by the entry of 1820, and so sanctioned it. But as Ross had no title, legal or equitable, to the entries made in 1820, at the time of his death, his executors could not

convey these entries, for they did not pass by the will. It will be seen, however, that the deed of the executor and legatee of Ross *does not describe the entries of* 1820, but only purports to "convey the claim of David Ross, deceased, to the lands and town lots therein mentioned." Record, p. 14.

HENRY STANBERY,
Counsel for Plaintiffs in Error.

January 9, 1864.

Supreme Court of the United States.

No. 123.—December Term, 1863.

Texas Niswanger et al.
vs.
Mary D. Saunders et al.
} In Error.

On motion for certiorari for diminution of record.

This motion comes too late and is prohibited by rule 32. (1 How., 31.)

The cause has been pending in this court about three years, and is just now reached for hearing.

The neglect is surely not chargeable on the present counsel, but it is chargeable *on the case;* and no special cause can be shown to the court accounting satisfactorily for the delay within the meaning of the rule. It is not enough to say that the counsel having charge of the case at the present time has not been guilty of neglect.

T. EWING.

Supreme Court of the United States.

No. 123.—December Term, 1863.

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In behalf of the defendants in error we claim, 1st, that the lands in controversy covered by the entry, survey, and patent of Saunders were not appropriated in law or equity by the entry, survey thereof, and patent to Ross' assignees.

The patent (p. 10-11 of Record) recites that the same warrants (upon which the Ross entry and survey were made), had been previously located in the district of Kentucky, and patented by the commonwealth of Virginia to said Ross, in trust, &c., and lost by interference with a prior grant to Henderson, and withdrawn and relocated upon the lands in question.

The plaintiffs in error derive their title under this patent, and are bound by its recitals. The fact, therefore, that the warrants under which the entry and survey were made, had been previously located, surveyed, and patented in Kentucky, is not open to controversy, and the question turns upon the legal effect of the fact. This we claim was to render the warrants *functus officio*, and the entry and survey in question made under color of them, a nullity.

But it is a part of the recital of the patent that the entry in Kentucky was *withdrawn*. This recital is legally untrue, being legally impossible after the entry was carried into grant, in such way as to restore vitality to the warrants and admit of their being afterwards located and patented in the Virginia military district, in Ohio.

The State of Virginia has ever retained and exercised her sovereignty over the subject of entry, survey, and patent of lands *south* of the Ohio, in satisfaction of warrants for military services, and the warrants in question, according to the laws of that State, were satisfied and withdrawn from the existing claims against her. Virginia has passed no law reviving and setting up

Gideon & Pearson, Print., 511 9th st., Washington.

warrants in cases where the land patented is lost by interference, or from any other cause. It has never been held, in the courts of that State, that the holder could withdraw and relocate them elsewhere *after survey* and *before patent.* No one would, for a moment, contend that in that State there could be a revival of the warrants *after patent,* and a consequent relocation. In Kentucky it has been held that there cannot be a withdrawal and relocation *after* survey, even *before* patent.—*Taylor* vs. *Myers,* 7 Wheaton, 23; *Withers* vs. *Tyler,* 4 Marsh, 173; *Taylor* vs. *Anderson,* 3 Marsh, 501.

If, then, this right to abandon a tract of land patented in Virginia, and to relocate the same in Ohio exists, it must be derived, not from the laws and usages of Virginia, but from the deed of cession or the acts of Congress subsequent thereto. If in the deed of cession it is in the following reservation:

"That in case the quantity of good land on the southeast side of the Ohio, upon the waters of the Cumberland river, and between the Green river and the Tennessee river, which have been reserved by law for the Virginia troops, upon the continental establishment should, from the North Carolina line bearing no further upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency should be made up to the said troops in good lands to be laid off between the river Scioto and little Miami, on the northwest side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia."

This reservation is in the most general terms. The land is ceded to the United States by Virginia, but in the event that it becomes necessary for the cause above named, the United States, who hold the legal title, is to hold it *in trust* for the officers and soldiers of the Virginia line on continental establishment. In short, it shall be the same as if Virginia had never parted with the title, except that in a proper case the grant must issue from the United States and not from Virginia. This would be a just construction of the general language in the reservation.

Now, if this land had remained the property of Virginia and subject to her laws, it is no where shown that these warrants, after being satisfied by entry, survey, and patent, after being returned to the Register's office and there filed as satisfied warrants, could by their mere description in the entry or patents, or if wanting there, by a memorandum from the office of the principal surveyor, have been located upon other lands. It is to be remembered that there has been no decision of a court of justice, no official act of the proper officer in Virginia setting up these warrants. It is the mere act of the party on his own suggestion. He does not as he cannot *withdraw* in Kentucky, but he *relocates,* that is, locates *a second time* in Ohio.

There was no authority for this by the laws and practice of Virginia, consequently none transferred by the deed of cession. On the contrary, it has never been decided in that State that there could be a withrawal and re-entry *after survey*. The language of Chief Justice Marshal on this subject (7 Wh., p. 24), is very striking. He says, "the military warrants to which these questions relate originate in the land law of Virginia. The question whether a warrant completely executed *by survey* can be withdrawn and so revived by the withdrawal as to be located in another place, has never, so far as I know, been decided in the courts of that State. In Kentucky, where the same law governs, it has been determined that a warrant once carried into survey, with the consent of the owner, cannot be re-entered and surveyed in another place. In Ohio it has not been understood that the question has been decided."

From this language it is clear that in his estimation an existing warrant was necessary to the entry, and that if the warrant be completely executed, it cannot exist for such purpose. It might be doubted whether a warrant were completely executed by survey, but none that is so by patent.

It is clear that the practice in Virginia, the decision in *Taylor* against *Myers*, and other cases cited above in Kentucky, and the deed of cession construed together and by each other, did not give the right to withdraw a warrant *patented* in Virginia, and relocate in Ohio; or what is more strictly the case here, locate a *Virginia patent* on lands in the Virginia Military District in Ohio.

Do the subsequent acts of Congress confer such right?

The first that throws any light on this subject is the recital in the first section of the act of August, 10, 1790 (Peters' Stat., vol. 1, p. 183), which is as follows:

"And, whereas, the agents for such of the troops of the State of Virginia, who served on the continental establishment in the army of the United States during the late war, have reported to the executive of said State, that there is not a sufficiency of good land on the southeasterly side of the Ohio river, according to the act of cession from the said State to the United States, and within the limits assigned by the laws of said State, to satisfy the troops for the bounty lands due them in conformity to the said laws; to the intent, therefore, that the difference between what has already been located for said troops, on the southeasterly side of said river, and the aggregate of what is due to the whole of said troops, may be located on the northwesterly side of said river, and between the Scioto and Little Miami rivers, and stipulated by the said State." &c.

This recital shows the intent to provide for warrants which had *not* been *located*, not for warrants which had been *located, sur-*

veyed, and *patented*. It excludes warrants which have been *located*, leaving the lands in Virginia and the laws of Virginia to provide for and take care of those warrants, when lost by interferance. This is the obvious construction of the act, and it is reasonable and proper that the land-officers of the United States should not be called upon to decide questions arising in Virginia, on conflicting claims on the lands in that State, (and afterwards in Kentucky,) under the Virginia laws.

Next in its order is the act of June 9, 1794 (1 Peters' Statutes p. 394), which provides that the person entitled to "bounty lands on the northwest side of the river Ohio, between the Scioto and Little Miami rivers, by the laws of the State of Virginia, and included in the terms of cession of the said State to the United States, shall, on producing the warrant, or a certified copy thereof, and a certificate under the seal of the office where the said warrants are legally kept, that the same, or a part thereof, remains unsatisfied, and on producing the survey, agreeably to the laws of Virginia, for the tract or tracts to which he or they may be entitled, as aforesaid, to the Secretary of the Department of War, such officer and soldier, his or their heirs or assigns, shall be entitled to and receive a patent for the same," &c. This act unequivocally excludes all warrants which have been merged in patents.

1. The party shall produce the warrant.

This was not done, and could not be done here, for the warrants were merged in a patent.

2. Or he must produce a certified copy thereof, and a certificate under the seal of the office where the said warrants were legally kept, that the same, or a part thereof, remain *unsatisfied*.

This was not done, nor could it be done here. These warrants were legally kept in the office of the Register of Lands in Virginia, and were filed as *satisfied warrants*.

This claim, therefore, receives no countenance from this act of Congress; on the contrary, it is strongly negative by its whole scope and spirit.

Next comes the act of May 13, 1800 (Vol. 2, p. 80, ch. 49.)

The first section provides for the issuing of patents on surveys which have been made "*on warrants*" issued from military service; not *on patents* heretofore issued in Virginia on such warrants. The idea carried through the other acts cited, is maintained in this. The patent of the United States issues on a survey made upon an *unsatisfied warrant*.

The second section provides for interfering claims within the district. It is in these words:

"SEC. 2. That in every case of interfering claims, under military warrants, to lands within the territory so reserved by the State of Virginia, when either party to such claims shall lose, or be evicted from the land, every such party shall have a right, and

hereby is authorized, to withdraw his, her, or their warrant, respectively, to the amount of said loss or eviction, and to enter, survey, and patent the same on any vacant land within the bounds aforesaid, and in the same manner as other warrants may be entered, surveyed, and patented."

It is limited in its terms to interfering claims under military warrants to "*lands within the territory so reserved.*" Not to lands out of said territory; a conflict out of the territory did not fall within the cognizance of the United States; they had nothing to do with it; no jurisdiction over it; no means of ascertaining it. It was a matter for the States in which it occurred to settle in their own way. Consequently Congress has made no provision for it, but has provided for lands within the district for which they held the trust. The right to re-locate where the land has been lost by interference, is of express statutory origin. This statute does not authorize the re-entry where the interference occurred *out of the district.* Such re-entry, therefore, is not *sustained,* but on the contrary is impliedly *forbidden* by this statute. You *may* re-enter it if your land is lost by interference *in the district.* You may *not* if lost out of it. I find no other act of Congress which bears upon the question, and it seems to me, that under no circumstances, however favorable, with proofs, no matter how clear, of interference and eviction out of the district, could warrants which have been once located and patented out of it, be relocated and patented within it.

But it is said on the other side that this is a question to be decided by the department at Washington before the emanation of the patent, and that this court has nothing to do with it but to give to the grant effect. This position is unsound. The issuing of a patent is a mere ministerial act, requiring, it is true, the exercise of judgment and discretion, but nevertheless subject to the examination of the judicial tribunals; and upon such examination patents are, in some cases, holden to be absolutely void, so that a younger patentee can recover against them *at law.*—*Stoddard et al. vs. Chambers,* 2 How., 318.

In other cases they are voidable, and though good at law, may be set aside in chancery.

It is thus shown that the warrants upon which the Ross entry, survey, and patent were founded were, at the time the entry was made, *functus officio,* being satisfied in law and surrendered to the State of Virginia by a previous entry and survey fully carried into grant in the Kentucky district; and that the pretended withdrawal of the entry by reason of interference with Henderson's grant, was a nullity. In legal effect the warrants were as effectually satisfied as they would have been if no interference with Henderson's grant had ever happened, and the lands located in Kentucky remained in the possession and enjoyment of the assignees of Ross.

This being so, the remaining question in the case is upon the construction of the proviso of the act of March 2d, 1807, applied to the facts and circumstances of the case. The question is: Was the survey of the lands in question made on the 29th day of September, 1817, in pursuance of the entry in the name of David Ross, assignee, &c., on May 21, 1810, predicated upon the defunct and satisfied warrants as above set forth, a survey within the meaning of said proviso, and such as, in virtue of which the lands included in it were withdrawn from the unappropriated residue of lands subject to entry in the district, and such as rendered the entry and survey of the same lands in behalf of Samuel H. Saunders, made on the 12th day of April, 1837, void, by force of said proviso?

This question is so fully considered, on both principle and authority, in the opinion of the supreme court of the State of Ohio by GHOLSON, J., in the present case (11 O. S. & R., 302), that we deem it unnecessary to do more in this place than to request that reference be had to said opinion.

The principle applied by that court in giving a construction to the proviso is to give effect to it as a protection to surveys however invalid, if made in good faith on a subsisting warrant which might have been available to sustain a survey, but not to extend it to a survey supported by no valid warrant, and made without authority.

In conclusion, it may be proper to remark that two patents were issued on the same day upon these surveys, one to each of the conflicting claimants, each having a *prima facie* effect to pass the legal title, and neither being prior in time to the other. The question as to which is paramount the other depends, therefore, wholly upon a right determination of the other questions brought under consideration.

T. EWING.